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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF MONTANA,

FROM MARCH 9, 1896, TO NOVEMBER 16, 1896.

BY

FLETCHER MADDOX,
REPORTER.

VOLUME XVIII.

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JUDGES

OF

The Supreme Court of the State of Montana,

DURING THE TIME OF THESE REPORTS.

HON. WILLIAM Y. PEMBERTON, Chief Justice.

HON. WILLIAM H. DE WITT, } Associate Justices.
HON. WILLIAM H. HUNT, }

OFFICERS OF THE COURT.

HENRI J. HASKELL, Attorney General.

BENJAMIN WEBSTER, CLERK.

FLETCHER MADDOX, REPORTER.



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ADMITTED FROM MAY 20, 1896, TO FEBRUARY 10, 1897.

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The Second Judicial District embraces the County of Silver Bow; JOHN J. MCHATTON and WILLIAM O. SPEER, Judges; residing at Butte.

The Third Judicial District embraces the Counties of Deer Lodge and Granite; THEODORE BRANTLEY, Judge; residing at Deer Lodge.

The Fourth Judicial District embraces the Counties of Missoula and Ravalli; FRANK H. WOODY, Judge; residing at Missoula.

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The Eighth Judicial District embraces the County of Cascade; CHARLES H. BENTON, Judge; residing at Great Falls.

The Ninth Judicial District embraces the Counties of Gallatin and Meagher; FRANK K. ARMSTRONG, Judge; residing at Bozeman.

The Tenth Judicial District embraces the Counties of Chouteau, Valley and Fergus; DUDLEY DU BOSE, Judge; residing at Fort Benton.

The Eleventh Judicial District embraces the Counties of Flathead and Teton; CHARLES W. POMEROY, Judge; residing at Kalispell.

TABLE OF CASES REPORTED.

Anderson, Bardwell v.....	528
Bailey, State ex rel. McLaughlin v.....	554
Baker v. Bartlett.....	446
Bardwell v. Anderson.....	528
Barnes, Merchants & M. National Bank v.....	335
Barnett v. Brown.....	367
Bartlett, Baker v.....	446
Bartlett, Largey v.....	265
Beck v. Northern Pacific R. R. Co.....	292
Benham v. Lemhi M. M. & R. Co.....	591
Bennett v. Tillmon.....	28
Berkin v. Marsh.....	152
Big Blackfoot M. Co., Nelson v.....	125
Bi-Metallic Ex. M. & M. Co., Severson v.....	13
Black, Gassert v.....	35
Brazier, Minnesota & Mont. L. & I. Co. v.....	444
Brown, Barnett v.....	367
Burd, Power v.....	22
Burton v. Laughrey.....	43
Butte Water Co., State ex rel. Milsted v.....	199
Camp Sing, State v.....	128
Cannon v. Lewis.....	402
Cannon, Murphy v.....	348
Cascade County v. City of Great Falls.....	537
Chapman, Largey v.....	563
Chauvin-Fant Furniture Co., Omaha Upholstering Co. v.....	468
Chicago Title & Trust Co. v. O' Marr.....	568
City of Butte v. Peasley.....	303
City of Great Falls v. Cascade County.....	537
Coleman, Rosenstein v.....	459
Commissioners of Gallatin County, Hoffman v.....	224
Commissioners of Meagher County v. Gardner.....	110
Congdon v. Olds.....	487
Conrad, Hunter v.....	177
Cowan, Ray v.....	259
Criswell v. Montana Central Ry. Co.....	167
Crittenden, Palatine Ins. Co. v.....	413
De Long, Tudor v.....	499
Dion, Gillespie v.....	183, 198
Du Vivier v. Phillips.....	370

Edgerton v. Power.....	350
Eldorado Ditch Co., Emerson v.....	247
Emerson v. Eldorado Ditch Co.....	247
Engesser v. Northern Pacific R. R. Co.....	31
Essler, Red Mountain Con. Min. Co. v.....	174
Firemans Fund Ins. Co., Holter Lumber Co. v.....	282
Fisher, State ex rel. Matts v.....	560
Gardner, Commissioners of Meagher County v.....	110
Gassert v. Black.....	35
Gassert v. Noyes.....	216
Gates, Sanford v.....	398
Gay, State v.....	51
Gilliam, State ex rel. The Thomas Cruse Sav. Bank v.....	94
Gillespie v. Dion.....	183, 198
Gilpatrick, Steele v.....	453
Goodwell v. Montana Central Ry. Co.....	292
Harmon v. Hawkins.....	525
Hastings v. Montana Union Ry. Co.....	492
Hawkins, Harmon v.....	525
Hefferlin, McMillan v.....	385
Hoffman v. Commissioners of Gallatin County.....	224
Holter Lumber Co. v. Fireman's Fund Ins. Co.....	282
Hope Mining Co., Smith v.....	432
Hunter v. Conrad.....	177
In re Phillips' Estate.....	311
In re Stewart's Estate.....	595
Johnson, State ex rel. Gillis v.....	556
Johnson, State ex rel. Metcalf v.....	548
Johnson, State Savings Bank v.....	440
Kenkle, McShane v.....	206
Kennelly v. Savage.....	119
Largey v. Bartlett.....	265
Largey v. Chapman.....	563
Laughrey, Burton v.....	43
Lemhi M. M. & R. Co., Benham v.....	501
Lewis, Cannon v.....	402
Light v. Pressey.....	263
Loeber, Rossiter v.....	372
Maddox v. Teague.....	512
Marsh, Berkin v.....	152
Marsh v. Morgan.....	19
Mason, State v.....	362
McMillan v. Hefferlin.....	385

TABLE OF CASES REPORTED.

ix

McShane v. Kenkle	208
Merchants & M. National Bank v. Barnes	335
Minnesota & Montana L. & I. Co. v. Brazier	444
Montana Central Ry. Co., Criswell v.	167
Montana Central Ry. Co., Goodwell v.	293
Montana Union Ry. Co., Hastings v.	493
Morgan, Marsh v.	19
Moore v. Northern Pacific R. R. Co.	290
Morris, Stebbins v.	32
Murphy v. Cannon	348
Murphy, Yore v.	342
Murray v. Swanson	533
National Fraternity Bld. & Loan Ass'n, Whitefoot v.	164
Nelson v. Big Blackfoot Min. Co.	125
Newell, Sanford v.	126
Northern Pacific R. R. Co., Beck v.	292
Northern Pacific R. R. Co., Engesser v.	31
Northern Pacific R. R. Co., Moore v.	290
Northern Pacific R. R. Co., Sales v.	293
Northern Pacific R. R. Co., Vogel v.	292
Noyes, Gassert v.	216
O'Brien, State v.	1
Olds, Congdon v.	487
Olsen v. Port Huron Live Stock Ass'n.	392
Omaha Upholstering Co., v. Chauvin-Fant Furniture Co.	468
O'Marr, Chicago Title & Trust Co. v.	568
O' Rourke, Schultz v.	418
Palatine Ins. Co. v. Crittenden	413
Parberry v. Woodson Sheep Co.	317
Peasley, City of Butte v.	303
Phillips, Du Vivier v.	370
Phillips Estate, In re	311
Phillips v. Phillips	306
Port Huron Live Stock Ass'n, Olsen v.	392
Power v. Burd	22
Power, Edgerton v.	350
Pressey, Light v.	263
Ray, Cowan v.	259
Red Mountain Con. Min. Co. v. Essler	174
Reek, State ex rel. Matts v.	557
Reek, State ex rel. Sligh v.	561
Reek, State ex rel. Stevens v.	562
Rosenstein v. Coleman	459
Rossiter v. Loeber	372
Rotwitt, State ex rel. Fidelity & Casualty Co. v.	92
Rotwitt, State ex rel. Travelers Ins Co. v.	87
Rotwitt, State ex rel. Woody v.	502
Ryan v. Spleth	45

Sales v. Northern Pacific R. R. Co.....	235
Sanford v. Gates.....	396
Sanford v. Newell.....	126
Savage, Kennelly v.....	119
Schlessinger, Sweeney v.....	326
Schultz v. O' Rourke.....	418
Severson v. B-Metallic Ex. M. & M. Co.....	13
Smith v. Hope Min Co.....	432
Spieth, Ryan v.....	45
State v. Camp Sing.....	128
State v. Gay.....	51
State v. Mason.....	362
State v. O'Brien.....	1
State Board of Equalization, State ex rel. Wallace v.....	473
State Board of Equalization, State ex rel. Commissioners of Custer Co. v.....	389
State ex rel. Bartlett v. Second Judicial District Court.....	481
State ex rel. Commissioners of Custer Co. v. State Board of Equalization.....	389
State ex rel. Fidelity & Casualty Co. v. Rotwitt.....	92
State ex rel. Gillis v. Johnson.....	556
State ex rel. Matts v. Fisher.....	560
State ex rel. Matts v. Reek.....	557
State ex rel. McLaughlin v. Bailey.....	554
State ex rel. Milsted v. Butte Water Co.....	199
State ex rel. Russel v. Tooker.....	540
State ex rel. Simpson v. Votaw.....	279
State ex rel. Sligh v. Reek.....	561
State ex rel. Stevens v Reek.....	562
State ex rel. The Thomas Cruse Sav. Bank v. Gilliam.....	94
State ex rel. Travelers Ins. Co. v Rotwitt.....	87
State ex rel. Wallace v. State Board of Equalization.....	473
State Savings Bank v. Johnson.....	440
Stebbins v. Morris.....	32
Steele v. Gilpatrick.....	453
Stewart's Estate, in re.....	595
Swanson, Murray v.....	533
Sweeney v. Schlessinger.....	326
Teague, Maddox v.....	512
Tillmon, Bennett v.....	28
Tooker, State ex rel. Russel v.....	540
Tudor v. De Long.....	499
Vinson, Waite v.....	410
Vogel v. Northern Pacific R. R. Co.....	232
Waite v. Vinson.....	410
Whitefoot v. National Fraternity Bld. and Loan Ass'n.....	164
Woodson Sheep Co., Parberry v.....	317
Yore v. Murphy.....	342

TABLE OF CASES CITED.

Alder Gulch Mining Co., v. Hayes, 6 Mont. 31.....	252
Allgier, In re, 65 Cal. 228.....	158
Allport v. Kelley, 2 Mont. 343.....	252
Anaconda Copper Mining Co., v. Butte & Boston Mining Co., 17 Mont. 519	
523	176, 489
Antoni v. Greenhow, 107 U. S. 769.....	99
Ashburn v. Poulter, 35 Conn. 553.....	431
Association v. Stonemetz, 29 Pa. St. 534.....	17
Atchison v. Peterson, 1 Mont. 561.....	438
Atkeson v. Lay, 22 S. W. 481.....	511
Authier v. Bennett Bros. Co., 16 Mont. 110.....	13
Baltimore & Ohio Railroad Co., v. Baugh, 149 U. S. 368, 380.....	498
Bank v. Bliss, 35 N. Y. 412.....	442
Bank v. Diefendorf, 123 N. Y. 491.....	377
Bank v. Elliott, 55 Iowa 104.....	17
Bank v. Harvey, 16 Iowa, 141.....	48
Bank v. Sharp, 6 How. 301.....	107
Barber v. Briscoe, 8 Mont. 214.....	278, 366, 438
Barbieri v. Ramelli, 84 Cal. 154.....	565
Barden v. Club, 10 Mont. 330.....	151
Barney v. Griffin, 2 N. Y. 385.....	466
Barnitz v. Beverly, 16 S. C. 1042.....	109
Bassett v. City of St. Joseph, 53 Mo. 290.....	406
Batterton v. Fuller, 60 N. W. 1071.....	194
Beatty v. Murray Placer Mining Co., 15 Mont. 314.....	252
Bedell, In re, 97 Cal. 339.....	599
Bettle v. Wilson, 14 Ohio, 257.....	34
Beverly v. Barnitz, 42 Pac. 731.....	98, 109
Biddell v. Brizzolari, 64 Cal. 363.....	565
Bigelow v. Windsor, 1 Gray, 299.....	40
Bissell v. Foss, 114 U. S. 252.....	491
Blanck v. Pausch, 113 Ill. 60.....	196
Blessing v. Sias, 7 Mont. 103.....	252
Bohn Manufacturing Co. v. Harrison, 13 Mont. 293.....	30
Bond v. Smith, 44 Hun. 219.....	407
Bonner v. Minnier, 13 Mont. 269.....	26
Book v. Mining Co., 58 Fed. 106.....	212
Booth v. Storrs, 75 Ill. 438.....	418
Bostwick v. Van Voorhis, 91 N. Y. 353.....	417
Botsford v. Beers, 11 Conn. 569.....	48
Boucher v. Mulverhill, 1 Mont. 306.....	489
Bowen v. Julius, 40 N. E. 700.....	429

Bowen v. Parkhurst, 24 Ill. 258.....	466
Brashin v. Tolleth, 48 N. W. 398.....	347
Brill v. Tuttle, 81 N. Y. 454.....	339
Broadwater v. Richards, 4 Mont. 52.....	252
Bronson v. Kenzie, 1 How. 311, 318.....	99
Buck v. Ingersoll, 11 Metc. 226.....	326
Buel v. Boughton, 2 Denlo, 91.....	337
Burnham v. Allen, 1 Gray. 496.....	378
Butte, Anaconda & Pacific Ry. Co. v. Montana Union Ry. Co. 16 Mont. 504	44
Byrne v. Byrne, 94 Cal. 576.....	309
Calkins v. Long, 22 Barb. 97.....	34
Case v. Beauregard, 101 U. S. 688.....	47
Carroll v. Siebenthaler, 27 Cal. 193.....	244
Chadwick v. Chadwick, 6 Mont. 566.....	191, 484
Chamberlin v. Gilman, 10 Col. 94.....	341
Chandler v. Bank, 13 N. J. Law, 260.....	17
Chapman v. Sargent, 40 Pac. 849.....	580
Chaquette v. Ortet, 60 Cal. 594.....	155
Charles v. Eshleman, 5 Col. 107.....	491
Chase v. Curtis, 113 U. S. 452.....	442
Cheaney v. Railroad Co., 68 Ill. 570.....	17
Chumasero v. Potts, 2 Mont. 242.....	541
Chumasero v. Vial, 3 Mont. 376.....	252
City of Joliet v. Verley, 35 Ill. 58.....	406
City of Lacon v. Page, 48 Ill. 499.....	406
Claflin v. McDermott, 12 Fed. 375.....	333
Clark v. Rayburn, 8 Wall. 318.....	99
Clayton v. Ryan, 14 Col. 419.....	194
Clemens v. Clemens, 37 N. Y. 59, 74.....	40
Coburn v. Smart, 53 Cal. 742.....	594
Colburn v. Northern Pacific Railroad Co., 13 Mont. 476.....	290
Colby v. Stevens, 38 N. H. 191.....	431
Coleman v. Scott, 27 Neb. 77.....	341
Collins v. Tillon, 26 Conn. 368.....	276
Commissioners v. Clark, 94 U. S. 278.....	378
Commissioners of Laramie Co. v. Commissioners of Albany Co. 92 U. S. 307	239
Commissioners of Yellowstone Co. v. Northern Pacific R. R. Co. 10 Mont 414	391
Commonwealth v. Richards, 131 Pa. St. 209	34
Commonwealth v. York, 9 Metc. 93.....	85
Connecticut M. I. Ins. Co. v. Cushman, 108 U. S. 65.....	108
Coombs v. Davis, 2 Wash. T. 486.....	340
Cornell v. Radway, 22 Wis. 251.....	48
Cotter, Estate of, 54 Cal. 215.....	598
Courtright v. Barkins, 2 Mont. 404.....	364
Crawford v. Lothrop, 3 Col. 428.....	476
Creek v. McManus, 13 Mont. 152.....	257
Creek v. Waterworks Co. 15 Mont. 121.....	223
Creighton v. Hershfield, 2 Mont. 169.....	519

TABLE OF CASES CITED.

xiii

Criswell v. Montana Central Railway Co., 17 Mont. 189.....	495
Cummins v. Lawrence Co., 1 S. D. 158.....	205
Cunnington v. Freeborn, 11 Wend. 241.....	464
Cunnington v. Scott, 4 Utah, 446.....	530
Cupit v. Park City Bank, 37 Pac. 564.....	470
Cupit v. Park City Bank, 40 Pac. 707.....	471
Curtis v. Richards, 9 Cal. 34.....	203
Curtis v. Whitney, 13 Wall. 68.....	99
Dale v. Irvin, 78 Ill. 171.....	195
Dale v. Purvis, 78 Cal. 113.....	364
Daniels v. Insurance Co., 2 Mont. 500.....	519
Dorris, Estate of, 93 Cal. 611.....	599
Davenport v. Kleinschmidt, 8 Mont. 467, 6 Mont. 502.....	519, 245
Davis v. Bilsland, 18 Wall. 659.....	534
Dawson v. Maria, 16 Pac. 413.....	332
Deardorf's Admr. v. Thatcher 78 Mo. 128.....	491
Decker v. Howell, 42 Cal. 636.....	490
Dewar's Estate, 10 Mont. 422.....	313
Ditch Co. v. Henry, 15 Mont. 576.....	350
Dole v. Burleigh, 1 Dak. 227.....	241
Donahue v. Gallavan, 43 Cal. 573.....	257
Donnelly et al. v. Strueven, 63 Cal. 182.....	471
Dorsey v. Barry, 24 Cal. 449.....	122
Dunham v. Waterman, 17 N. Y. 9.....	463
Duryea v. Burt, 28 Cal. 569.....	490
Dutton v. Dutton, 30 Ind. 452.....	34
Eames v. Haver, 43 Pac. 1120.....	431
Eddy v. Simpson, 3 Cal. 349.....	222
Edwards v. Kearsey, 96 U. S. 595.....	99, 107
Edwards v. Knight, 8 Ohio, 375.....	193
Elwood v. Beymer, 100 Ind. 504.....	41
Engesser v. Railroad Co., 18 Mont. 31.....	33
Engine Co. v. Hubbard, 101 U. S. 183.....	442
Estate of Cotter, 54 Cal. 215.....	598
Estate of Dorris, 93 Cal. 611.....	599
Estate of Kelley, 63 Cal. 106.....	314
Estate of Marrey, 65 Cal. 287.....	314
Estate of McFarland, In re. 10 Mont. 445.....	314
Elkhorn Trading Co., v. Tacoma Min. Co., 16 Mont. 322.....	442
Evans v. City of Trenton, 24 N. J. Law, 769.....	17
Everson v. City of Syracuse, 29 Hun. 486.....	149
Farrington v. Sexton, 43 Mich. 454.....	333
Fee v. Fee, 10 Ohio, 470.....	345
Felton v. West Iron Mountain Min. Co., 16 Mont. 81.....	15, 18
Ferreday v. Wightwick, 1 Russ. & Mylne, 49.....	491
First National Bank v. Bell S. & C. M. Co., 8 Mont. 32, 156 U. S. 470.....	567
First National Bank v. Boyce, 15 Mont. 162.....	413
First National Bank v. Neill, 13 Mont. 377.....	413
First National Bank v. Roberts, 9 Mont., 323.....	531
Fischli v. Fischli, 1 Blackf. 360.....	41
Fisherdict v. Hutton, 62 N. W. 488.....	583

Fletcher v. Peck, 6 Crauch, 123.....	128
Flick v. Mining Co., 8 Mont., 304.....	350
Freeborn, v. Glazer, 10 Cal. 337.....	470
Fultz v. Walters, 2 Mont., 165.....	278
Galigher v. Lockhart, 11 Mont. 113.....	489
Gans v. Switzer, 9 Mont. 413.....	442
Gans v. Woolfolk, 2 Mont. 463.....	255
Gardner v. Com. National Bank, 95 Ill. 298.....	467
Garver v. Lynde, 7 Mont. 110.....	278
Gassert v. Black, 11 Mont. 185.....	41
Gassert v. Noyes, 18 Mont. 216.....	438
Gill v. Ferris, 82 Mo. 156.....	183
Gill v. N. Y. Cab Co., 48 Hun. 524.....	16
Gillespie v. Dion, 18 Mont. 183.....	365
Gilliam v. Black, 16 Mont. 217.....	254
Glass v. Wolf's Admr. 82 Ala. 281.....	158
Goodrich Lumber Co., v. Davie, 13 Mont. 76.....	448
Goodwell v. Montana Central Ry. Co., 18 Mont. 293.....	495, 497
Graves v. Lebanon National Bank, 19 Am. Rep. 50.....	418
Green v. Biddle, 8 Wheat. 1.....	107
Green v. Craft, 28 Miss. 70.....	150
Gregg v. Bostwick, 33 Cal. 220.....	26
Griffin v. Railroad Co., 102 N. Y. 449.....	40
Griswold v. Boley, 1 Mont., 545.....	363
Gum v. Murray, 6 Mont., 10.....	363
Haase v. Corbin, 2 Mont. 409.....	340
Hall v. Railroad Co., 28 Vt. 408.....	17
Hasley v. McLean, 12 Allen, 438.....	442
Hamilton v. Railroad Co., 17 Mont. 334.....	408
Hammond v. Paxton, 58 Mich. 393.....	452
Hancock v. Gomez, 58 Barb. 490.....	277
Hangen v. Water Co., 28 Pac. 244.....	206
Harmon v. Railroad Co., 42 N. E. 505.....	122
Harpending v. Meyer, 55 Cal. 555.....	346
Harris v. Calvert, 44 Pac. 25.....	158
Harris v. Lloyd, 11 Mont. 406.....	489
Hartman v. Smith, 7 Mont. 406.....	489
Haverstick v. Trudel, 51 Cal. 431.....	278
Hazard v. Loring, 10 Cush. 267.....	431
Hefferlin v. Chambers, 16 Mont. 349.....	243
Heilbron v. Ditch Co., 76 Cal. 10.....	530
Helma S. H. & S. Co., v Wells, 16 Mont. 65.....	596
Henry & Coatsworth Co., v. McCurdy, 36 Neb. 863.....	333
Henry v. Railroad Co., 27 Vt. 455.....	17
Henry v. Superior Court, 93 Cal. 569.....	485
Herberger v. Husman, 27 Pac. 428.....	432
Herbert v. King, 1 Mont. 475.....	255
Heyfron v. Mahoney, 9 Mont. 497.....	198, 366
Hiatt v. Kinkard, 40 Neb. 178.....	364
Higgins v. Armstrong, 9 Col. 38.....	491
Higgins' Estate, In re. 15 Mont. 474.....	484

TABLE OF CASES CITED.

xv

Hilbour v. Reeding, 3 Mont. 15.....	489
Hoag v. Howard, 55 Cal. 564.....	451
Holder v. Railroad Co., 71 Ill. 106.....	17
Holmes v. Holmes, 9 N. Y. 525.....	430
Holt v. Bancroft, 30 Ala. 193.....	48
Home Insurance Co., v. Holway, 55 Iowa, 571.....	417
Home Machine Co., v. Farrington, 82 N. Y. 121.....	417
Hood v. Hood, 85 N. Y. 561.....	155
Hotchkiss v. Brooks, 93 Ill. 386.....	26
Hotchkiss v. Marion, 12 Mont. 218.....	244
Howard v. Bugbee, 24 How. 461.....	99
Hudson v. Bishop, 32 Fed. 519, 915.....	155, 163
Hudson v. Bishop, 33 Fed. 519.....	158
Hutchinson v. Lord, 1 Wis. 286.....	467
Hutton v. Hutton's Admr., 3 Pa. St. 100.....	34
Insurance Co. v. Cushman, 108 U. S. 51.....	99, 103
Irwin v. Gregory, 13 Gray. 215.....	430
Irvine v. McKeon, 23 Cal. 472.....	442
Jackson v. Dickinson, 15 Johns 309.....	452
Jackson v. Steward, 8 Cowen, 400.....	465
Jessup, In re. 80 Cal. 625.....	314
Johnson v. Mining Co., 16 Mont. 164.....	408
Jones v. Clark et al. 42 Cal. 180.....	491
Jordan v. Van Epps, 85 N. Y. 427, 436.....	40
Judge v. Bushwell, 13 Bush. 67.....	491
Judson v. Malloy, 40 Cal. 300.....	219
Kane v. Hood, 13 Pick. 281.....	430
Kahn v. Smelting Co., 102 U. S. 645.....	491
Kelley v. Cable Co., 8 Mont. 440.....	519
Kelley, Estate of, 63 Cal. 106.....	314
Kelley v. Tibbals, 53 Pa. St. 408.....	340
Kelly v. Baker, 10 Minn. 124.....	26
Kelly v. Dill, 23 Minn. 435.....	26
Kelly v. Mining Co., 16 Mont. 484.....	299
Kennelly v. Savage, 18 Mont. 119.....	371
Kilpatrick v. Bridge Co., 49 Pa. St. 121.....	17
Kleinschmidt v. Binzel, 14 Mont. 31.....	42, 400
Kleinschmidt v. Iler, 6 Mont. 122.....	252, 255
Kleinschmidt v. McAndrews, 117 U. S. 232.....	254
Kleinschmidt v. Steele, 15 Mont. 188.....	547
Klemp v. Winter, 23 Kan. 699.....	158
Kresin v. Mau, 15 Minn. 116.....	26
Krueger v. Spleth, 8 Mont. 489.....	49
Lamme v. Dodson, 4 Mont. 591.....	445
Laport v. Bacon, 48 Vt. 176.....	337
Largey v. Chapman, 18 Mont. 563.....	587
Largey v. Sedman, 3 Mont. 472.....	252
La Pose v. Logansport Nat. Bank, 102 Ind. 332.....	417
Larson v. James, 29 Pac. 183.....	442
Last Chance Mining Co., v. Bunker Hill & S. Min. & Con. Co. 49 Fed. 430..	222

Lathrop v. O'Brien, 58 N. W. 987.....	431
Latin v. Gillette, 96 Cal. 317.....	345
Lebcher v. Commissioners of Custer Co., 9 Mont. 320.....	239
Ledlie v. Wallen, 17 Mont. 150.....	51
Leese v. Sherwood, 21 Cal. 152.....	286
Leggett v. Hyde, 58 N. Y. 272.....	183
Leopold v. Silverman, 7 Mont. 266.....	580
Lloyd v. Sullivan, 9 Mont. 588.....	252
Lockey v. Horsky, 4 Mont. 457, 463.....	252, 255
Lockwood v. Kelsea, 41 N. H. 185.....	337
Long v. Burnett, 13 Iowa 28.....	485
Loring v. Alline, 9 Cush. 68.....	156
Losee v. Bullard, 79 N. Y. 404.....	443
Loucks v. Edmondson, 18 Cal. 203.....	471
Louisiana v. New Orleans, 102 U. S. 203.....	99
Lubbock v. McMann, 82 Cal. 226.....	26
Lumbardt v. Stearns, 4 Cush. 61.....	206
Lundeen v. Electric Light Co., 17 Mont. 32.....	406
Lux's Estate, In re. 100 Cal. 593.....	317
Macclay v. Sands, 94 U. S. 586.....	204
Macomber v. Doane, 2 Allen 541.....	339
Mandersched v. City of Dubuque, 25 Iowa 108.....	408
Manville v. Parks et al. 7 Col. 128.....	491
Marcum v. Coleman, 10 Mont. 78.....	583
Marlow v. Lacy, 68 Tex. 154.....	155
Marlett v. Jackman, 3 Allen 278, 294.....	156
Marrey, Estate of, 65 Cal. 287.....	314
Mason v. Germaine, 1 Mont. 263.....	535
Mayo v. Knowlton, 134 N. Y. 250.....	428
Mayor, etc., of City of New York v. Manhattan Ry. Co. 143 N. Y. 1.....	118
Mayor, etc., v. Harrison, 30 N. J. Law, 73.....	117
McCauley v. McKelg, 8 Mont. 389.....	219, 438
McCleery v. Allen, 7 Neb. 21.....	463
McConnell v. McClair, Denver, 7 Col. 128.....	491
McCracken v. Hayward, 2 How. 608.....	99, 107
McFadden v. Wilson, 96 Ind. 253.....	337, 339
McFarland's Estate, In re. 10 Mont. 445.....	314
McGuire v. Spence, 91 N. Y. 303.....	406
McIllwrath v. Hollander, 39 A. M. Rep. 488.....	452
McKay v. Montana Union Ry. Co., 13 Mont. 15.....	254, 257
McKimm v. Mann, 141 Mass. 507.....	156
McKinstry v. Clark, 4 Mont. 370.....	363
McLaren v. McNamara, 55 Cal. 508.....	286
McPherson v. Cox, 86 N. Y. 472.....	383
McVey v. Cantrell, 8 Hun. 522.....	304
Meadowcraft v. Walsh, 15 Mont. 544.....	378
Meeks v. Vassault, 3 Sawy. 206.....	160
Mercantile Co., v. Fussy, 13 Mont. 401.....	254
Merchants' Nat. Bank v. Greenwood, 16 Mont. 395.....	42, 47
Merrick v. Coal Co., 61 Ill. 472.....	17
Merrifield v. Longmire, 66 Cal. 181.....	314
Merrigan v. English, 9 Mont. 113.....	535

TABLE OF CASES CITED.

xvii

Middle Creek Ditch Co., v. Henry, 15 Mont. 558.....	438
Middleton v. State, 120 Ind. 166.....	118
Milburn M. Co., v. Johnson, 9 Mont. 542.....	583
Mining Co., v. Powers, 3 Mont. 344.....	445, 450
Mock v. City of Munice, 9 Ind. App. 536.....	364
Morley v. Railway Co., 146 U. S. 162.....	99, 104
Moon v. Rollins, 36 Cal. 333.....	219
Moore v. Northern Pac. R. R. Co., 18 Mont. 290.....	292
Morton v. State, 19 S. W. 225.....	60
Moxon v. Wilkinson, 2 Mont. 421.....	350
Murray v. Heinze, 17 Mont. 78.....	567
Newell v. Whitwell, 16 Mont. 243.....	473
Nichols v. Jones, 14 Col. 60.....	530
Nicholson v. Leavitt, 2 Selden (N. Y.) 510.....	462
Nimmons v. Tappan, 2 Sweeney, 652.....	443
Nolan v. Lovelock, 1 Mont. 227.....	489
North British Ins. Co., v. Lloyd, 10 Exch. 523.....	417
Northern Pacific Railroad Co. v. Charless 162 U. S. 359.....	497
Northern Pacific Railroad Co. v. Hambly, 154 U. S. 349.....	496, 498
Northern Pacific Railroad Co. v. Peterson, 162 U. S. 346.....	497
Norton v. Commissioners, 129 U. S. 479.....	173
Notley v. Buck, 8 Barn. & Cr. 86.....	340
Ogden v. Sanders, 12 Wheat. 215.....	99
Ortman v. Dixon, 13 Cal. 34.....	222
Ould v. Stoddart, 54 Cal. 613.....	566
Overton v. Beavers, 19 Ark. 625.....	158
Pacific Co. v. Burr, 86 Cal. 279.....	44
Palmer v. Murray, 8 Mont. 174.....	519
Parberry v. Woodson Sheep Co., 18 Mont. 317.....	567
Park v. Wiley, 67 Ala. 310.....	431
Parker v. Connor, 45 Am. Rep. 187.....	452
Parks v. Jackson, 11 Wend. 442.....	452
Partridge v. McKinney, 10 Cal. 181.....	219
Payne v. Sheldon, 63 Barb. 169.....	48
Pease v. Cole, 53 Conn. 53.....	491
People v. Brooks, 22 Ill. App. 594.....	158
People v. Carlton, 115 N. Y. 623.....	78
People v. Coughlin, 44 Pac. 94.....	86
People ex rel. Crawford v. Lothrop, 3.....	476
People v. Gillespie, 47 Ill. App. 522.....	118
People v. Hoover, 92 Ill. 575.....	118
People v. Keyser, 53 Cal. 184.....	6
People v. Martin, 60 Cal. 153.....	146, 148
People v. Pool, 27 Cal. 573.....	79
People v. Williams, 18 Cal. 195.....	10
Perkins v. Stemmell 114 N. Y. 359.....	156
Peterson v. Railroad Co., 16 S. C. 843.....	299
Petring v. Chrisler, 90 Mo. 649.....	580
Phelps v. Piper, 67 N. W. 755.....	557
Phillips v. Curtis, 38 Pac. 405.....	511
Pickering v. Whiting, 47 Iowa 242.....	486

Pitts v. Allen, 72 Ga. 69.....	361
Pollock v. Trust Co., 157 U. S. 429.....	142
Porter v. Brooks, 35 Cal. 199.....	565
Porter v. Clark, 6 Mont. 246.....	252
Postlewait v. Howes, 3 Iowa, 365.....	48
Power v. Gum, 6 Mont. 5.....	241
Pray v. Hegeman, 98 N. Y. 357.....	40
Priest v. Brown, 35 Pac. 323.....	501
Probate Judge v. Stevenson, 55 Mich. 320.....	157, 162
Proctor v. Jennings, 6 Nev. 83.....	222
Quehl v. Peterson, 47 Minn. 13.....	26
Quinn v. Quinn, 81 Cal. 14.....	491
Railroad Co. v. Baugh, 149 U. S. 368.....	297
Railroad Co. v. Charless, 16 Sup. Ct. 848.....	302
Railroad Co. v. Hambly, 154 U. S. 349.....	299
Railroad Co. v. Keegan, 160 U. S. 250.....	300
Railroad Co. v. Ketchum, 27 Conn. 181.....	17
Railroad Co. v. King, 69 Miss. 852.....	113
Railroad Co. v. McCartney, 121 Ind. 385.....	364
Railroad Co. v. Midgeon, 68 Fed. 811.....	214
Railroad Co. v. Peterson, 16 Sup. Ct. 843.....	299
Railroad Co., v. Ross, 112 U. S. 377.....	498
Railroad Co. v. Sage, 65 Ill. 328.....	17
Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 478.....	496, 498
Rector, etc., of Trinity Church v. Vanderbilt, 98 N. Y. 170.....	443
Remington Machine Co. v. Kezertie, 49 Wis. 409.....	417
Reske v. Reske, 51 Mich. 541.....	26
Rex v. Martin, 3 Car & P. 211.....	85
Richardson v. Jones, 58 Ind. 240.....	41
Roper v. Trustees, 91 Ill. 518.....	417
Ross v. Gill, 4 Cal. 250.....	158
Ross v. Sedgwick, 10 Pac. 400.....	501
Ruff v. Rader, 2 Mont. 211.....	409
Rundell v. Lakey, 40 N. Y. 516.....	149
Rutledge v. Crawford, 91 Cal. 534.....	194
Ryan v. Maxey, 17 Mont. 164.....	411
Sackett, In re. 73 Cal. 300.....	486
Sanderson v. Stockdale, 11 Md. 563.....	48
Sands v. Maclay, 2 Mont. 35.....	204
San Francisco Gas Co. v. City of San Francisco, 9 Cal. 467.....	204
Santa Clara Min. Ass'n v. Meredith, 49 Md. 389.....	16
Schwartz v. County Court, 14 Col. 44.....	192
Selbel v. Bath, 40 Pac. 756.....	451
Selbert v. Lewis, 122 U. S. 284.....	99
Settembre v. Putnam, 30 Cal. 490.....	490
Skillman v. Lackman, 23 Cal. 204.....	490
Smith v. Christian, 47 Cal. 18.....	530
Smith v. Harris, 32 Pac. 616.....	196
Smith v. Rankin, 25 Pac. 586.....	501
Smith v. Smith, 79 N. Y. 634.....	40
Southmayd v. Southmayd, 4 Mont. 112.....	489

TABLE OF CASES CITED.

xix

Southwest Lead and Zinc Co. v. Phoenix Ins. Co. 27 Mo. App. 446.....	238
Soyer v. Water Co., 15 Mont. 1.....	238
Stackpole v. Hallahan, 16 Mont. 40.....	509, 547, 567
Starr v. United States, 153 U. S. 614.....	78
State ex rel. Aachen & Munich Fire Ins. Co. v. Rotwitt, 17 Mont. 41.....	91
State ex rel. Matts v. G. J. Reek.....	560
State ex rel. Metcalf v Johnson.....	555
State ex rel. Milsted v. Butte City Water Co., 18 Mont. 199.....	335, 567
State ex rel. Pigott v. Benton, 13 Mont. 306.....	255, 542
State ex rel. Russell v. Tooker, 18 Mont. 540.....	563
State ex rel. Sam Tol v. French, 17 Mont. 54.....	137, 140
State ex rel. Woods v. Tooker, 15 Mont. 8.....	137
State ex rel. Woody v. Rotwitt, 18 Mont. 502.....	542, 568
State v. Anderson, 14 Mont. 541.....	81
State v. Baker, 13 Mont. 160.....	61
State v. Black, 15 Mont. 148.....	362, 524
State v. Biggerstaff, 17 Mont. 510.....	80, 86
State v. Cadwell, 16 Mont. 119.....	31
State v. Commissioners of Hancock Co., 11 Ohio St. 183.....	205
State v. Dickerman, 16 Mont. 278.....	241
State v. Fry, 10 Mont. 407.....	362
State v. Gibbs, 10 Mont. 210.....	364
State v. Glenn, 17 Mont. 17.....	62
State v. Jackson, 9 Mont. 508.....	81, 372
State v. Mitchell, 17 Mont. 67.....	137
State v. Northrop, 13 Mont. 534.....	362, 364
State v. O'Brien, 18 Mont. 1.....	567
State v. Owsley, 17 Mont. 94.....	151
State v. Pilgrim, 17 Mont. 311.....	364
State v. Raymond, 12 Mont. 228.....	151
State v. Rotwitt, 17 Mont. 41.....	94, 418
State v. Russell, 13 Mont. 164.....	63
State v. Sears, 43 Pac. 482, 485.....	99, 103
State v. Smith, 2 Strob. 77.....	85
State v. Spalding, 34 Minn. 361.....	78
State v. Weir, 31 Pac. 417.....	507
State v. Whaley, 16 Mont. 574.....	5, 362, 364
Stevenson, In re. 72 Cal. 164.....	599
Stewart v. Budd, 7 Mont. 573.....	241
St. Johns v. Charles, 106 Mass. 262.....	341
St. Joseph Lead Co. v. Simms, 108 Mo. 222.....	481
Stove Co. Shedd, 82 Iowa, 540.....	333
Stove Co. v. Shedd, 82 Iowa, 540.....	90
Strickler v. Railway Co., 125 Ind. 412.....	347
Strong v. Hollon, 39 Mich. 411.....	333
Stroup v. State, 70 Ind. 435.....	158
Sturgis v. Crowninshield, 4 Wheat. 122.....	99
Sumner v. Sawtelle, 8 Minn. 309.....	26
Sweetland v. Olsen, 11 Mont. 29.....	438
Tappan v. Evans, 11 N. H. 311.....	48
Teal v. Walker, 111 U. S. 242.....	99

Territory ex rel. Tanner v. Potts, 3 Mont. 364.....	541
Territory v. Burgess, 8 Mont. 58.....	11, 81
Territory v. Hanna, 5 Mont. 246.....	364
Territory v. Rehberg, 6 Mont. 471.....	371
Territory v. Young, 5 Mont. 245.....	252
Terry v. Anderson, 95 U. S. 628.....	99
Tesson v. Atlantic Mut. Ins. Co., 40 Mo. 33.....	288
Thamling v. Duffy, 14 Mont. 567.....	376
Thayer v. Meeker, 86 Ill. 470.....	433
Thompson In re. 9 Mont. 381.....	13
Thompson v. Lyon, 20 S. E. 812.....	431
Thurmond v. Reese, 3 Ga. 449.....	48
Tillar v. Bass, 21 S. W. 34.....	26
Tillison v. Ewing, 8 South. 404.....	347
Tillotson v. Millard, 7 Minn. 513.....	26
Todd v. Stewart, 14 Col. 286.....	196
Trevaskis v. Peard, 44 Pac. 246.....	215
Tripp v. Brownell, 12 Cush. 376.....	339
Tromans v. Mahlman, 27 Pac. 1094.....	26
Tucker v. Jones, 8 Mont. 225.....	438
Turner v. Adams, 46 Mo. 95.....	48
Twell v. Twell, 6 Mont. 19.....	252, 255
United States v. Huckabee, 16 Wall. 414.....	383
Vall v. Rinehart, 105 Ind. 6.....	40
Valles v. Brown, 27 Pac. 945.....	194
Vaughn v. Dawes, 7 Mont. 360.....	472
Von Hoffman v. City of Quincy, 4 Wall. 535.....	99
Walker v. Thompson, 61 Me. 347.....	90
Warnock v. Harlow, 96 Cal. 294.....	450
Warren v. His Creditors, 28 Pac. 267.....	501
Washington Home of Chicago v. City of Chicago, 157 Ill. 414.....	173
Wastl v. Montana Union Ry. Co., 17 Mont. 213.....	62
Water Co. v. Powell, 34 Cal. 109.....	220
Watkins v. Glenn, 40 Pac. 316.....	109
Weed v. Village of Ballston, 76 N. Y. 329.....	406
Wells, Fargo & Co. v. State Board of Equalization, 56 Cal. 194.....	481
Wesling v. Noonan, 31 Miss. 602.....	431
Wethey v. Kemper, 17 Mont. 491.....	166, 442
Whelan v. Rellly, 61 Mo. 565.....	431
Whipple v. Pope, 33 Ill. 334.....	466
Whitney v. Blackburn, 17 Or. 564.....	196
Whitney v. Whitman, 4 Mass. 508.....	156
Wicke v. Ins. Co., 90 Iowa 4.....	364
Wiggin v. Fine, 17 Mont. 575.....	493
Wilder v. Campbell, 43 Pac. 677.....	109
Wilmington, etc., R. R. Co. v. Sing, 18 S. C. 116.....	417
Wilson v. Lucas, 43 Mo. 290.....	195
Wood v. Babb, 16 S. C. 427.....	431
Woods v. Berry, 7 Mont. 195.....	363
Wood v. Currey, 57 Cal. 209.....	346
Woody v. Jamison, 40 Pac. 61.....	326
Wortman v. Kleinschmidt, 12 Mont. 316.....	536
Wright v. Fawcett, 42 Tex. 203.....	194
Young v. Marshall, 8 Bing. 43.....	339
Zickler v. Deegan, 16 Mont. 200, 198.....	529, 531
Zoller v. McDonald, 23 Cal. 136.....	286

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

MARCH TERM, 1896.

PRESENT :

HON. WILLIAM Y. PEMBERTON, Chief Justice.

HON. WILLIAM H. DE WITT, { Associate Justices.

HON. WILLIAM H. HUNT, }

STATE, RESPONDENT, v. O'BRIEN, APPELLANT.

[Submitted March 2, 1896. Decided March 9, 1896.]

CRIMINAL LAW—Appeal—Rulings during progress of trial—Review on appeal from judgment.—Under section 2321, Penal Code, providing that upon an appeal taken by the defendant from a judgment the court may review any intermediate order or "ruling involving the merits or which may have affected the judgment," rulings of the trial court upon matters of law in the exclusion or admission of testimony during the progress of the trial may be brought before this court by bills of exception on an appeal from the judgment without a motion for a new trial; but this section does not permit the review, on an appeal from the judgment only, of matters embraced within any of the cases for which a new trial may be granted under section 2192, *Id.*, except errors in the decision of questions of law during the trial, which may be reviewed either by appeal from the judgment or from an order denying a motion for a new trial. (*State v. Whaley*, 16 Mont. 594, distinguished.)

SAME—Evidence—Impeachment—Witness.—It is error to allow the prosecuting attorney,

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for the purpose of impeachment, to testify as to what a witness to the homicide stated at the coroner's inquest, by repeating her statements as taken down in writing by him at the time and stating that she had so stated, where the statements concerning which she was to be impeached had not been first related to her with an opportunity to answer as to their truth or to explain them, nor the written evidence shown to her before putting the questions, as required by section 3380 of the Code of Civil Procedure.

SAME—Same—Motives of defendant.—On a trial for murder, where the killing occurred in defendant's house, the relations existing between the defendant and a woman with whom he was living may be proved by the state as bearing upon the defendant's motives, and as to whether under all the circumstances he acted as a reasonable man.

SAME—Same—Statements by defendant before coroner.—The state should not be permitted to introduce statements by the defendant before the coroner immediately after the homicide, made in ignorance of his lawful rights, without the aid of counsel and under the belief that he was obliged to answer the questions put to him.

SAME—Trial—Objections without merit.—Continual objections by the counsel for the state to questions asked the witnesses for the defendant, many without merit, and made for the purpose of keeping a knowledge of the case on its merits from the jury, is improper practice.

SAME—Reasonable doubt—Instructions.—An instruction as to reasonable doubt, that, if the jury, "or any one of them," entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, the defendant should be given the benefit of the doubt and acquitted, is objectionable in implying that if one jurymen has a reasonable doubt the eleven must concur in acquittal.

SAME—Self defense.—The general doctrine of the right of a man to defend himself, if assailed in his own house, is that he need retreat no further.

SAME—Additional witnesses—Showing required to obtain.—Under section 4636, Penal Code, restricting the state and defendant each to six witnesses, except upon order of the court upon proper showing by affidavit or otherwise, it is proper for the court to require the defendant, upon a request for a subpoena for additional witnesses, to disclose the materiality of their testimony.

REHEARING APPEAL—Bills of exception—Verity.—A bill of exceptions imports verity, and, it being the duty of the trial judge not merely to sign what is presented as a bill of exceptions but to examine it and make it conformable to the facts, the appellate court will assume that a bill, certified by the judge to contain all the evidence bearing upon the exception taken, is correct.

Appeal from Eighth Judicial District, Cascade County.

CONVICTION for manslaughter. The defendant was tried before BENTON, J. **Reversed.**

Statement of the case by the justice delivering the opinion.

The defendant was indicted for murder in the first degree, and convicted of manslaughter, in the killing of one Frank Bixby, in Cascade county, on August 18, 1895. He appeals from the final judgment of conviction. The information charges that the killing was done with a rifle.

Leslie & Downing, for Appellant.

I. It was not a proper exercise of judicial authority for

the court to demand of the defendant in the first instance that he disclose his defense. The two persons for whom a subpoena was requested, were essential and important witnesses for the defendant on the trial of said cause, and the refusal of the court to permit a subpoena to be issued for them, was a denial of justice and we think in conflict with sections 6 and 16, article III of the state constitution.

II. The cross-examination of the defendant in regard to his evidence before the coroner's jury under the circumstances in which it was extracted from him was extremely prejudicial to the defense. There is no question but what the statements made by the defendant such as they were, were not voluntary, were made under duress, without counsel, without being advised as to his rights, and without opportunity afforded him to consult with an attorney. While this evidence was withdrawn, its effect upon the jury could not be withdrawn. (*People v. McMahon*, 15 N. Y. 384; 1 Greenleaf on Evidence (12th Ed.) §§ 224, 225; *People v. Mordeau*, 8 N. E. 496; 1 Wharton on Evidence (7th Ed.) § 690.) At all events the foundation for the introduction of such evidence should have been laid by preliminary proof showing *prima facie* that the confession, if such it could be called, was freely and voluntarily made. (*People v. Soto*, 49 Cal. 69; *People v. Yeaton*, 17 Pac. 544.)

III. The cross-examination of Minnie O'Brien was improper. It did not relate to her evidence in chief, and the object and purpose of the evidence was to injure and prejudice the defendant. (*State v. Gleim*, 17 Mont. 17.)

IV. The questions put to the prosecuting attorney for the purpose of impeaching Mrs. O'Brien were improper. No such questions were asked her by the prosecution while she was on the stand. (*State v. Hunsaker*, 16 Pac. 605; *People v. Devine*, 44 Cal. 432; 1 Thompson on Trials, §§ 501, 502; § 3380, Code of Civil Procedure.)

V. The court having charged that a man assailed unlawfully in his own house is not obliged to retreat under any circumstances, it was error to charge in the same instruction that

it must appear from the evidence that the danger to the defendant was so pressing and urgent that in order to save his own life, or prevent his receiving great bodily harm the killing of the deceased was absolutely necessary. (*State v. Middleham*, 17 N. W. 446; 2 Wharton on Criminal Law (7th Ed.) § 1024.) If the court gives an instruction, correctly stating the law, and afterwards another nullifying the first, the judgment will be reversed. (*People v. Campbell*, 30 Cal. 313; *People v. Simons*, 60 Cal. 73; *People v. Anderson*, 44 Cal. 69; *Territory v. Owings*, 3 Mont. 137.) Where on a trial for murder, two parts of the charge of the court to the jury are contradictory, and one is correct and the other is erroneous, the judgment of conviction will be reversed, even though the appellate court may be satisfied from the evidence that the jury ought to have found the defendant guilty. (*People v. Valencia*, 43 Cal. 552; *People v. Wong Ah Ngow*, 54 Cal. 154.)

Henri J. Haskell, Attorney General and *Ella K. Haskell*, for the state, Respondent.

HUNT, J.—1. This appeal being from a judgment, and the record containing bills of exception, but no motion for a new trial, it is argued in behalf of the state that this court has no jurisdiction to pass upon the errors alleged in the exclusion and admission of certain testimony during the progress of the trial. But this appeal is taken since the adoption of the Penal Code of 1895.

Under the former Code (§ 394, page 476, Comp. St., 1887), an appeal to the supreme court could be taken by the defendant as a matter of right from any judgment against him, and upon appeal any decision of the court or intermediate order made in the progress of the case could be reviewed. The interpretation placed upon that statute was that errors of law in the admission or exclusion of illegal or legal evidence must have been called to the attention of the district court by motion for new trial, to the end that that court should thereby first have an opportunity to correct its own errors before an

appeal lay to this court. (*State v. Whaley*, 16 Mont. 574.) But the Penal Code of 1895 provides as follows: Section 2270: "An appeal to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him." Section 2321: "Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment."

Section 2321 is identical with section 1259 of the Penal Code of California. The difference between section 394 of the Code of 1887 and section 2321 of the Code of 1895, consists in this: Under the old Code, the appellate court was limited in its review to any decision of the court or any intermediate order made in the progress of the case; under the new Code, upon appeal from a judgment, the court may review not only any intermediate order, but likewise *a ruling involving the merits, or which may have affected the judgment*. In the use of the word "ruling" the legislature evidently intended to permit a review of the actions of the district court upon matters of law in the exclusion or admission of testimony involving the merits of the case on an appeal from the judgment only. Such rulings had not been included in the interpretation of the words "decision or intermediate order" in the older statute; that is, a distinction has been recognized between a decision and a ruling. The older statute is therefore to be distinguished from the new. In the one, a decision or order was regarded as a determination by the court in the settlement of the controversy or matter before it; while in the new Code a ruling means generally a settlement or decision of a point of law arising upon the trial of the case, without necessarily the force or solemnity of a judgment or order. (Black, Law Dict.; Cent. Dict.)

We do not hold that under section 2321, above cited, matters may be reviewed on appeal from a judgment only when they are embraced within any of the provisions of the law made for granting new trials (section 2192), except errors in the decision of questions of law arising during the course of the trial.

Lathrop v. O'Brien, 58 N. W. 987.....	431
Latin v. Gillette, 95 Cal. 317.....	345
Lebcher v. Commissioners of Custer Co., 9 Mont. 320.....	239
Ledlie v. Wallen, 17 Mont. 150.....	51
Leese v. Sherwood, 21 Cal. 152.....	286
Legett v. Hyde, 58 N. Y. 272.....	183
Leopold v. Silverman, 7 Mont. 266.....	580
Lloyd v. Sullivan, 9 Mont. 588.....	252
Lockey v. Horsky, 4 Mont. 457, 463.....	252, 255
Lockwood v. Kelsea, 41 N. H. 185.....	337
Long v. Burnett, 13 Iowa 28.....	485
Loring v. Alline, 9 Cush. 68.....	156
Losee v. Bullard, 79 N. Y. 404.....	443
Loucks v. Edmondson, 18 Cal. 203.....	471
Louisiana v. New Orleans, 102 U. S. 203.....	99
Lubbock v. McMann, 82 Cal. 226.....	28
Lumbardt v. Stearns, 4 Cush. 61.....	206
Lundeen v. Electric Light Co., 17 Mont. 32.....	406
Lux's Estate, In re. 100 Cal. 593.....	317
Maclay v. Sands, 94 U. S. 586.....	204
Macomber v. Doane, 2 Allen 541.....	339
Mandersched v. City of Dubuque, 25 Iowa 108.....	408
Manville v. Parks et al. 7 Col. 128.....	491
Marcum v. Coleman, 10 Mont. 78.....	583
Marlow v. Lacy, 68 Tex. 154.....	155
Marlett v. Jackman, 3 Allen. 278, 294.....	156
Marrey, Estate of, 65 Cal. 287.....	314
Mason v. Germaine, 1 Mont. 263.....	535
Mayo v. Knowlton, 134 N. Y. 250.....	428
Mayor, etc., of City of New York v. Manhattan Ry. Co. 143 N. Y. 1.....	118
Mayor, etc., v. Harrison, 30 N. J. Law, 73.....	117
McCauley v. McKeig, 8 Mont. 389.....	219, 438
McCleery v. Allen, 7 Neb. 21.....	463
McConnell v. McClair, Denver, 7 Col. 128.....	491
McCracken v. Hayward, 2 How. 608.....	99, 107
McFadden v. Wilson, 96 Ind. 253.....	337, 339
McFarland's Estate, In re. 10 Mont. 445.....	314
McGuire v. Spence, 91 N. Y. 303.....	406
McIllwrath v. Hollander, 39 A. M. Rep. 486.....	452
McKay v. Montana Union Ry. Co., 13 Mont. 15.....	254, 257
McKimm v. Mann, 141 Mass. 507.....	156
McKinstry v. Clark, 4 Mont. 370.....	363
McLaren v. McNamara, 55 Cal. 508.....	286
McPherson v. Cox, 86 N. Y. 472.....	383
McVey v. Cantrell, 8 Hun. 522.....	304
Meadowcraft v. Walsh, 15 Mont. 544.....	378
Meeks v. Vassault, 3 Sawy. 206.....	160
Mercantile Co., v. Fussy, 13 Mont. 401.....	254
Merchants' Nat. Bank v. Greenhood, 16 Mont. 395.....	42, 47
Merrick v. Coal Co., 61 Ill. 472.....	17
Merrifield v. Longmire, 66 Cal. 181.....	314
Merrigan v. English, 9 Mont. 113.....	535

TABLE OF CASES CITED.

xvii

Middle Creek Ditch Co., v. Henry, 15 Mont. 558.....	438
Middleton v. State, 120 Ind. 166.....	118
Milburn M. Co., v. Johnson, 9 Mont. 542.....	583
Mining Co., v. Powers, 3 Mont. 344.....	445, 450
Mock v. City of Munice, 9 Ind. App. 536.....	364
Morley v. Railway Co., 146 U. S. 162.....	99, 104
Moon v. Rollins, 36 Cal. 333.....	219
Moore v. Northern Pac. R. R. Co., 18 Mont. 290.....	292
Morton v. State, 19 S. W. 225.....	60
Moxon v. Wilkinson, 2 Mont. 421.....	350
Murray v. Heinze, 17 Mont. 78.....	567
Newell v. Whitwell, 16 Mont. 243.....	478
Nichols v. Jones, 14 Col. 60.....	530
Nicholson v. Leavitt, 2 Selden (N. Y.) 510.....	462
Nimmons v. Tappan, 2 Sweeney, 652.....	443
Nolan v. Lovelock, 1 Mont. 227.....	489
North British Ins. Co., v. Lloyd, 10 Exch. 523.....	417
Northern Pacific Railroad Co. v. Charless 162 U. S. 359.....	497
Northern Pacific Railroad Co. v. Hambly, 154 U. S. 349.....	496, 498
Northern Pacific Railroad Co. v. Peterson, 162 U. S. 346.....	497
Norton v. Commissioners, 129 U. S. 479.....	173
Notley v. Buck, 8 Barn. & Cr. 86.....	340
Ogden v. Sanders, 12 Wheat. 215.....	99
Ortman v. Dixon, 13 Cal. 34.....	222
Ould v. Stoddart, 54 Cal. 613.....	566
Overton v. Beavers, 19 Ark. 625.....	158
Pacific Co. v. Burr, 86 Cal. 279.....	44
Palmer v. Murray, 8 Mont. 174.....	519
Parberry v. Woodson Sheep Co., 18 Mont. 317.....	567
Park v. Wiley, 67 Ala. 310.....	431
Parker v. Connor, 45 Am. Rep. 187.....	452
Parks v. Jackson, 11 Wend. 442.....	452
Partridge v. McKinney, 10 Cal. 181.....	219
Payne v. Sheldon, 63 Barb. 169.....	48
Pease v. Cole, 53 Conn. 53.....	491
People v. Brooks, 22 Ill. App. 594.....	158
People v. Carlton, 115 N. Y. 623.....	78
People v. Coughlin, 44 Pac. 94.....	86
People ex rel. Crawford v. Lothrop, 3.....	476
People v. Gillespie, 47 Ill. App. 522.....	118
People v. Hoover, 92 Ill. 575.....	118
People v. Keyser, 53 Cal. 184.....	6
People v. Martin, 60 Cal. 153.....	146, 148
People v. Pool, 27 Cal. 573.....	79
People v. Williams, 18 Cal. 195.....	10
Perkins v. Stemmell 114 N. Y. 359.....	155
Peterson v. Railroad Co., 16 S. C. 843.....	299
Petring v. Chrisler, 90 Mo. 649.....	580
Phelps v. Piper, 67 N. W. 755.....	557
Phillips v. Curtis, 38 Pac. 405.....	511
Pickering v. Whiting, 47 Iowa 242.....	486

Pitts v. Allen, 72 Ga. 69.....	364
Pollock v. Trust Co., 157 U. S. 429.....	142
Porter v. Brooks, 35 Cal. 199.....	565
Porter v. Clark, 6 Mont. 246.....	252
Postlewait v. Howes, 3 Iowa, 365.....	48
Power v. Gum, 6 Mont. 5.....	241
Pray v. Hegeman, 98 N. Y. 357.....	40
Priest v. Brown, 35 Pac. 323.....	501
Probate Judge v. Stevenson, 55 Mich. 320.....	157, 162
Proctor v. Jennings, 6 Nev. 83.....	222
Quehl v. Peterson, 47 Minn. 13.....	26
Quinn v. Quinn, 81 Cal. 14.....	491
Railroad Co. v. Baugh, 149 U. S. 368.....	297
Railroad Co. v. Charless, 16 Sup. Ct. 848.....	302
Railroad Co. v. Hambly, 154 U. S. 349.....	299
Railroad Co. v. Keegan, 160 U. S. 250.....	300
Railroad Co. v. Ketchum, 27 Conn. 181.....	17
Railroad Co. v. King, 69 Miss. 852.....	118
Railroad Co. v. McCartney, 121 Ind. 385.....	364
Railroad Co. v. Midgeon, 68 Fed. 811.....	214
Railroad Co. v. Peterson, 16 Sup. Ct. 843.....	299
Railroad Co., v. Ross, 112 U. S. 377.....	498
Railroad Co. v. Sage, 65 Ill. 328.....	17
Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 478.....	496, 498
Rector, etc., of Trinity Church v. Vanderbilt, 98 N. Y. 170.....	443
Remington Machine Co. v. Kezertie, 49 Wis. 409.....	417
Reske v. Reske, 51 Mich. 541.....	26
Rex v. Martin, 3 Car & P. 211.....	85
Richardson v. Jones, 58 Ind. 240.....	41
Roper v. Trustees, 91 Ill. 518.....	417
Ross v. Gill, 4 Cal. 250.....	158
Ross v. Sedgwick, 10 Pac. 400.....	501
Ruff v. Rader, 2 Mont. 211.....	409
Rundell v. Lakey, 40 N. Y. 516.....	149
Rutledge v. Crawford, 91 Cal. 534.....	194
Ryan v. Maxey, 17 Mont. 164.....	411
Sackett, In re. 73 Cal. 300.....	486
Sanderson v. Stockdale, 11 Md. 563.....	48
Sands v. Maclay, 2 Mont. 35.....	204
San Francisco Gas Co. v. City of San Francisco, 9 Cal. 467.....	204
Santa Clara Min. Ass'n v. Meredith, 49 Md. 389.....	16
Schwartz v. County Court, 14 Col. 44.....	192
Seibel v. Bath, 40 Pac. 756.....	451
Seibert v. Lewis, 122 U. S. 284.....	99
Settembre v. Putnam, 30 Cal. 490.....	490
Skillman v. Lackman, 23 Cal. 204.....	490
Smith v. Christian, 47 Cal. 18.....	530
Smith v. Harris, 32 Pac. 616.....	196
Smith v. Rankin, 25 Pac. 586.....	501
Smith v. Smith, 79 N. Y. 634.....	40
Southmayd v. Southmayd, 4 Mont. 112.....	489

TABLE OF CASES CITED.

xix

Southwest Lead and Zinc Co. v. Phoenix Ins. Co. 27 Mo. App. 446.....	238
Soyer v. Water Co., 15 Mont. 1.....	238
Stackpole v. Hallahan, 16 Mont. 40.....	509, 547, 567
Starr v. United States, 153 U. S. 614.....	78
State ex rel. Aachen & Munich Fire Ins Co. v. Rotwitt, 17 Mont. 41.....	91
State ex rel. Matts v. G. J. Reek.....	560
State ex rel. Metcalf v Johnson.....	555
State ex rel. Milsted v. Butte City Water Co., 18 Mont. 199.....	385, 567
State ex rel. Pigott v. Benton, 13 Mont. 306.....	255, 542
State ex rel. Russell v. Tooker, 18 Mont. 540.....	553
State ex rel. Sam Tol v. French, 17 Mont. 54.....	137, 140
State ex rel. Woods v. Tooker, 15 Mont. 8.....	137
State ex rel. Woody v. Rotwitt, 18 Mont. 502.....	542, 558
State v. Anderson, 14 Mont. 541.....	81
State v. Baker, 13 Mont. 180.....	61
State v. Black, 15 Mont. 148.....	362, 524
State v. Biggerstaff, 17 Mont. 510.....	80, 86
State v. Cadwell, 16 Mont. 119.....	31
State v. Commissioners of Hancock Co., 11 Ohio St. 183.....	205
State v. Dickerman, 16 Mont. 278.....	241
State v. Fry, 10 Mont. 407.....	362
State v. Gibbs, 10 Mont. 210.....	364
State v. Glenn, 17 Mont. 17.....	62
State v. Jackson, 9 Mont. 508.....	81, 372
State v. Mitchell, 17 Mont. 67.....	137
State v. Northrop, 13 Mont. 534.....	362, 364
State v. O'Brien, 18 Mont. 1.....	567
State v. Owsley, 17 Mont. 94.....	151
State v. Pilgrim, 17 Mont. 311.....	364
State v. Raymond, 12 Mont. 226.....	151
State v. Rotwitt, 17 Mont. 41.....	94, 418
State v. Russell, 13 Mont. 164.....	63
State v. Sears, 43 Pac. 482, 485.....	99, 103
State v. Smith, 2 Strob. 77.....	85
State v. Spalding, 34 Minn. 361.....	78
State v. Weir, 31 Pac. 417.....	507
State v. Whaley, 16 Mont. 574.....	5, 362, 364
Stevenson, In re. 72 Cal. 164.....	599
Stewart v. Budd, 7 Mont. 573.....	241
St. Johns v. Charles, 105 Mass. 262.....	341
St. Joseph Lead Co. v. Simms, 108 Mo. 222.....	481
Stove Co. Shedd, 82 Iowa, 540.....	333
Stove Co. v. Shedd, 82 Iowa, 540.....	90
Strickler v. Railway Co., 125 Ind. 412.....	347
Strong v. Hollon, 39 Mich. 411.....	333
Stroup v. State, 70 Ind. 495.....	158
Sturgis v. Crowninshield, 4 Wheat, 122.....	99
Sumner v. Sawtelle, 8 Minn. 309.....	26
Sweetland v. Olsen, 11 Mont. 29.....	438
Tappan v. Evans, 11 N. H. 311.....	48
Teal v. Walker, 111 U. S. 242.....	99

Territory ex rel. Tanner v. Potts, 3 Mont. 364.....	541
Territory v. Burgess, 8 Mont. 58.....	11, 81
Territory v. Hanna, 5 Mont. 246.....	364
Territory v. Rehberg, 6 Mont. 471.....	371
Territory v. Young, 5 Mont. 245.....	252
Terry v. Anderson, 95 U. S. 628.....	99
Tesson v. Atlantic Mut. Ins. Co., 40 Mo. 33.....	288
Thamling v. Duffy, 14 Mont. 567.....	376
Thayer v. Meeker, 86 Ill. 470.....	432
Thompson In re. 9 Mont. 381.....	13
Thompson v. Lyon, 20 S. E. 812.....	431
Thurmond v. Reese, 3 Ga. 449.....	48
Tillar v. Bass, 21 S. W. 34.....	26
Tillison v. Ewing, 8 South. 404.....	347
Tillotson v. Millard, 7 Minn. 513.....	26
Todd v. Stewart, 14 Col. 288.....	196
Trevaskis v. Peard, 44 Pac. 246.....	215
Tripp v. Brownell, 12 Cush. 376.....	339
Tromans v. Mahlman, 27 Pac. 1094.....	26
Tucker v. Jones, 8 Mont. 225.....	438
Turner v. Adams, 46 Mo. 95.....	48
Twell v. Twell, 6 Mont. 19.....	252, 255
United States v. Huckabee, 16 Wall. 414.....	383
Vall v. Rinehart, 105 Ind. 6.....	40
Valles v. Brown, 27 Pac. 945.....	194
Vaughn v. Dawes, 7 Mont. 360.....	472
Von Hoffman v. City of Quincy, 4 Wall. 535.....	90
Walker v. Thompson, 61 Me. 347.....	90
Warnock v. Harlow, 96 Cal. 294.....	450
Warren v. His Creditors, 28 Pac. 257.....	501
Washington Home of Chicago v. City of Chicago, 157 Ill. 414.....	173
Wastl v. Montana Union Ry. Co., 17 Mont. 213.....	62
Water Co. v. Powell, 34 Cal. 109.....	220
Watkins v. Glenn, 40 Pac. 316.....	109
Weed v. Village of Ballston, 76 N. Y. 329.....	406
Wells, Fargo & Co. v. State Board of Equalization, 56 Cal. 194.....	481
Wesling v. Noonan, 31 Miss. 602.....	431
Wethey v. Kemper, 17 Mont. 491.....	166, 442
Whelan v. Rellly, 61 Mo. 565.....	431
Whipple v. Pope, 33 Ill. 334.....	466
Whitney v. Blackburn, 17 Or. 564.....	196
Whitney v. Whitman, 4 Mass. 508.....	156
Wicke v. Ins. Co., 90 Iowa 4.....	364
Wiggin v. Fine, 17 Mont. 575.....	493
Wilder v. Campbell, 43 Pac. 677.....	109
Wilmington, etc., R. R. Co. v. Sing, 18 S. C. 116.....	417
Wilson v. Lucas, 43 Mo. 290.....	195
Wood v. Babb, 16 S. C. 427.....	431
Woods v. Berry, 7 Mont. 195.....	363
Wood v. Currey, 57 Cal. 209.....	346
Woody v. Jamison, 40 Pac. 61.....	326
Wortman v. Kleinschmidt, 12 Mont. 316.....	536
Wright v. Fawcett, 42 Tex. 203.....	194
Young v. Marshall, 8 Bing. 43.....	339
Zickler v. Deegan, 16 Mont. 200, 198.....	529, 531
Zoller v. McDonald, 23 Cal. 136.....	286

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

MARCH TERM, 1896.

PRESENT :

HON. WILLIAM Y. PEMBERTON, Chief Justice.

HON. WILLIAM H. DE WITT, { Associate Justices.

HON. WILLIAM H. HUNT, }

STATE, RESPONDENT, *v.* O'BRIEN, APPELLANT.

[Submitted March 2, 1896. Decided March 9, 1896.]

CRIMINAL LAW—Appeal—Rulings during progress of trial—Review on appeal from judgment.—Under section 2821, Penal Code, providing that upon an appeal taken by the defendant from a judgment the court may review any intermediate order or "ruling involving the merits or which may have affected the judgment," rulings of the trial court upon matters of law in the exclusion or admission of testimony during the progress of the trial may be brought before this court by bills of exception on an appeal from the judgment without a motion for a new trial; but this section does not permit the review, on an appeal from the judgment only, of matters embraced within any of the cases for which a new trial may be granted under section 2192, *Id.*, except errors in the decision of questions of law during the trial, which may be reviewed either by appeal from the judgment or from an order denying a motion for a new trial. (*State v. Whaley*, 16 Mont. 594, distinguished.)

SAME—Evidence—Impeachment—Witness.—It is error to allow the prosecuting attorney,

18	1
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for the purpose of impeachment, to testify as to what a witness to the homicide stated at the coroner's inquest, by repeating her statements as taken down in writing by him at the time and stating that she had so stated, where the statements concerning which she was to be impeached had not been first related to her with an opportunity to answer as to their truth or to explain them, nor the written evidence shown to her before putting the questions, as required by section 3380 of the Code of Civil Procedure.

SAME—Same—Motives of defendant.—On a trial for murder, where the killing occurred in defendant's house, the relations existing between the defendant and a woman with whom he was living may be proved by the state as bearing upon the defendant's motives, and as to whether under all the circumstances he acted as a reasonable man.

SAME—Same—Statements by defendant before coroner.—The state should not be permitted to introduce statements by the defendant before the coroner immediately after the homicide, made in ignorance of his lawful rights, without the aid of counsel and under the belief that he was obliged to answer the questions put to him.

SAME—Trial—Objections without merit.—Continual objections by the counsel for the state to questions asked the witnesses for the defendant, many without merit, and made for the purpose of keeping a knowledge of the case on its merits from the jury, is improper practice.

SAME—Reasonable doubt—Instructions.—An instruction as to reasonable doubt, that, if the jury, "or any one of them," entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, the defendant should be given the benefit of the doubt and acquitted, is objectionable in implying that if one jurymen has a reasonable doubt the eleven must concur in acquittal.

SAME—Self defense.—The general doctrine of the right of a man to defend himself, if assailed in his own house, is that he need retreat no further.

SAME—Additional witnesses—Showing required to obtain.—Under section 4656, Penal Code, restricting the state and defendant each to six witnesses, except upon order of the court upon proper showing by affidavit or otherwise, it is proper for the court to require the defendant, upon a request for a subpoena for additional witnesses, to disclose the materiality of their testimony.

REHEARING APPEAL—Bills of exception—Verity.—A bill of exceptions imports verity, and, it being the duty of the trial judge not merely to sign what is presented as a bill of exceptions but to examine it and make it conformable to the facts, the appellate court will assume that a bill, certified by the judge to contain all the evidence bearing upon the exception taken, is correct.

Appeal from Eighth Judicial District, Cascade County.

CONVICTION for manslaughter. The defendant was tried before BENTON, J. Reversed.

Statement of the case by the justice delivering the opinion.

The defendant was indicted for murder in the first degree, and convicted of manslaughter, in the killing of one Frank Bixby, in Cascade county, on August 18, 1895. He appeals from the final judgment of conviction. The information charges that the killing was done with a rifle.

Leslie & Downing, for Appellant.

I. It was not a proper exercise of judicial authority for

the court to demand of the defendant in the first instance that he disclose his defense. The two persons for whom a subpoena was requested, were essential and important witnesses for the defendant on the trial of said cause, and the refusal of the court to permit a subpoena to be issued for them, was a denial of justice and we think in conflict with sections 6 and 16, article III of the state constitution.

II. The cross-examination of the defendant in regard to his evidence before the coroner's jury under the circumstances in which it was extracted from him was extremely prejudicial to the defense. There is no question but what the statements made by the defendant such as they were, were not voluntary, were made under duress, without counsel, without being advised as to his rights, and without opportunity afforded him to consult with an attorney. While this evidence was withdrawn, its effect upon the jury could not be withdrawn. (*People v. McMahon*, 15 N. Y. 384; 1 Greenleaf on Evidence (12th Ed.) §§ 224, 225; *People v. Mordeau*, 8 N. E. 496; 1 Wharton on Evidence (7th Ed.) § 690.) At all events the foundation for the introduction of such evidence should have been laid by preliminary proof showing *prima facie* that the confession, if such it could be called, was freely and voluntarily made. (*People v. Soto*, 49 Cal. 69; *People v. Yeaton*, 17 Pac. 544.)

III. The cross-examination of Minnie O'Brien was improper. It did not relate to her evidence in chief, and the object and purpose of the evidence was to injure and prejudice the defendant. (*State v. Gleim*, 17 Mont. 17.)

IV. The questions put to the prosecuting attorney for the purpose of impeaching Mrs. O'Brien were improper. No such questions were asked her by the prosecution while she was on the stand. (*State v. Hunsaker*, 16 Pac. 605; *People v. Devine*, 44 Cal. 432; 1 Thompson on Trials, §§ 501, 502; § 3380, Code of Civil Procedure.)

V. The court having charged that a man assailed unlawfully in his own house is not obliged to retreat under any circumstances, it was error to charge in the same instruction that

it must appear from the evidence that the danger to the defendant was so pressing and urgent that in order to save his own life, or prevent his receiving great bodily harm the killing of the deceased was absolutely necessary. (*State v. Middleham*, 17 N. W. 446; 2 Wharton on Criminal Law (7th Ed.) § 1024.) If the court gives an instruction, correctly stating the law, and afterwards another nullifying the first, the judgment will be reversed. (*People v. Campbell*, 30 Cal. 313; *People v. Simons*, 60 Cal. 73; *People v. Anderson*, 44 Cal. 69; *Territory v. Owings*, 3 Mont. 137.) Where on a trial for murder, two parts of the charge of the court to the jury are contradictory, and one is correct and the other is erroneous, the judgment of conviction will be reversed, even though the appellate court may be satisfied from the evidence that the jury ought to have found the defendant guilty. (*People v. Valencia*, 43 Cal. 552; *People v. Wong Ah Ngow*, 54 Cal. 154.)

Henri J. Haskell, Attorney General and *Ella K. Haskell*, for the state, Respondent.

HUNT, J.—1. This appeal being from a judgment, and the record containing bills of exception, but no motion for a new trial, it is argued in behalf of the state that this court has no jurisdiction to pass upon the errors alleged in the exclusion and admission of certain testimony during the progress of the trial. But this appeal is taken since the adoption of the Penal Code of 1895.

Under the former Code (§ 394, page 476, Comp. St., 1887), an appeal to the supreme court could be taken by the defendant as a matter of right from any judgment against him, and upon appeal any decision of the court or intermediate order made in the progress of the case could be reviewed. The interpretation placed upon that statute was that errors of law in the admission or exclusion of illegal or legal evidence must have been called to the attention of the district court by motion for new trial, to the end that that court should thereby first have an opportunity to correct its own errors before an

appeal lay to this court. (*State v. Whaley*, 16 Mont. 574.) But the Penal Code of 1895 provides as follows: Section 2270: "An appeal to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him." Section 2321: "Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment."

Section 2321 is identical with section 1259 of the Penal Code of California. The difference between section 394 of the Code of 1887 and section 2321 of the Code of 1895, consists in this: Under the old Code, the appellate court was limited in its review to any decision of the court or any intermediate order made in the progress of the case; under the new Code, upon appeal from a judgment, the court may review not only any intermediate order, but likewise *a ruling involving the merits, or which may have affected the judgment*. In the use of the word "ruling" the legislature evidently intended to permit a review of the actions of the district court upon matters of law in the exclusion or admission of testimony involving the merits of the case on an appeal from the judgment only. Such rulings had not been included in the interpretation of the words "decision or intermediate order" in the older statute; that is, a distinction has been recognized between a decision and a ruling. The older statute is therefore to be distinguished from the new. In the one, a decision or order was regarded as a determination by the court in the settlement of the controversy or matter before it; while in the new Code a ruling means generally a settlement or decision of a point of law arising upon the trial of the case, without necessarily the force or solemnity of a judgment or order. (Black, Law Dict.; Cent. Dict.)

We do not hold that under section 2321, above cited, matters may be reviewed on appeal from a judgment only when they are embraced within any of the provisions of the law made for granting new trials (section 2192), except errors in the decision of questions of law arising during the course of the trial.

Lathrop v. O'Brien, 58 N. W. 987.....	431
Latin v. Gillette, 96 Cal. 317.....	345
Lebcher v. Commissioners of Custer Co., 9 Mont. 320.....	239
Ledlie v. Wallen, 17 Mont. 150.....	51
Leese v. Sherwood, 21 Cal. 152.....	296
Leggett v. Hyde, 58 N. Y. 272.....	183
Leopold v. Silverman, 7 Mont. 266.....	580
Lloyd v. Sullivan, 9 Mont. 588.....	252
Lockey v. Horsky, 4 Mont. 457, 463.....	252, 255
Lockwood v. Kelsea, 41 N. H. 185.....	337
Long v. Burnett, 13 Iowa 28.....	485
Loring v. Alline, 9 Cush. 68.....	156
Losee v. Bullard, 79 N. Y. 404.....	443
Loucks v. Edmondson, 18 Cal. 203.....	471
Louisiana v. New Orleans, 102 U. S. 203.....	99
Lubbock v. McMann, 82 Cal. 226.....	26
Lumbardt v. Stearns, 4 Cush. 61.....	206
Lundeen v. Electric Light Co., 17 Mont. 32.....	406
Lux's Estate, In re. 100 Cal. 593.....	317
Macclay v. Sands, 94 U. S. 586.....	204
Macomber v. Doane, 2 Allen 541.....	339
Mandersched v. City of Dubuque, 25 Iowa 108.....	408
Manville v. Parks et al. 7 Col. 128.....	491
Marcum v. Coleman, 10 Mont. 78.....	583
Marlow v. Lacy, 68 Tex. 154.....	155
Marlett v. Jackman, 3 Allen. 278, 294.....	156
Marrey, Estate of, 65 Cal. 287.....	314
Mason v. Germaine, 1 Mont. 263.....	535
Mayo v. Knowlton, 134 N. Y. 250.....	428
Mayor, etc., of City of New York v. Manhattan Ry. Co. 143 N. Y. 1.....	118
Mayor, etc., v. Harrison, 30 N. J. Law, 73.....	117
McCauley v. McKelg, 8 Mont. 389.....	219, 438
McCleery v. Allen, 7 Neb. 21.....	463
McConnell v. McClair, Denver, 7 Col. 128.....	491
McCracken v. Hayward, 2 How. 608.....	99, 107
McFadden v. Wilson, 96 Ind. 253.....	337, 339
McFarland's Estate, In re. 10 Mont. 445.....	314
McGuire v. Spence, 91 N. Y. 303.....	406
McIllwrath v. Hollander, 39 A. M. Rep. 486.....	452
McKay v. Montana Union Ry. Co., 13 Mont. 15.....	254, 257
McKimm v. Mann, 141 Mass. 507.....	156
McKinstry v. Clark, 4 Mont. 370.....	363
McLaren v. McNamara, 55 Cal. 508.....	286
McPherson v. Cox, 86 N. Y. 472.....	383
McVey v. Cantrell, 8 Hun. 522.....	304
Meadowcraft v. Walsh, 15 Mont. 544.....	378
Meeks v. Vassault, 3 Sawy. 206.....	160
Mercantile Co., v. Fussy, 13 Mont. 401.....	254
Merchants' Nat. Bank v. Greenwood, 16 Mont. 395.....	42, 47
Merrick v. Coal Co., 61 Ill. 472.....	17
Merrifield v. Longmire, 66 Cal. 181.....	314
Merrigan v. English, 9 Mont. 113.....	535

TABLE OF CASES CITED.

xvii

Middle Creek Ditch Co., v. Henry, 15 Mont. 558.....	438
Middleton v. State, 120 Ind. 166.....	118
Milburn M. Co., v. Johnson, 9 Mont. 542.....	583
Mining Co., v. Powers, 3 Mont. 344.....	445, 450
Mock v. City of Munice, 9 Ind. App. 536.....	364
Morley v. Railway Co., 146 U. S. 162.....	99, 104
Moon v. Rollins, 36 Cal. 333.....	219
Moore v. Northern Pac. R. R. Co., 18 Mont. 290.....	292
Morton v. State, 19 S. W. 225.....	60
Moxon v. Wilkinson, 2 Mont. 421.....	350
Murray v. Heinze, 17 Mont. 78.....	567
Newell v. Whitwell, 16 Mont. 243.....	473
Nichols v. Jones, 14 Col. 60.....	530
Nicholson v. Leavitt, 2 Selden (N. Y.) 510.....	462
Nimmons v. Tappan, 2 Sweeney, 652.....	443
Nolan v. Lovelock, 1 Mont. 227.....	489
North British Ins. Co., v. Lloyd, 10 Exch. 523.....	417
Northern Pacific Railroad Co. v. Charles 162 U. S. 359.....	497
Northern Pacific Railroad Co. v. Hambly, 154 U. S. 349.....	496, 498
Northern Pacific Railroad Co. v. Peterson, 162 U. S. 346.....	497
Norton v. Commissioners, 129 U. S. 479.....	173
Notley v. Buck, 8 Barn. & Cr. 86.....	340
Ogden v. Sanders, 12 Wheat. 215.....	99
Ortman v. Dixon, 13 Cal. 34.....	222
Ould v. Stoddart, 54 Cal. 613.....	566
Overton v. Beavers, 19 Ark. 625.....	158
Pacific Co. v. Burr, 86 Cal. 279.....	44
Palmer v. Murray, 8 Mont. 174.....	519
Parberry v. Woodson Sheep Co., 18 Mont. 317.....	567
Park v. Wiley, 67 Ala. 310.....	431
Parker v. Connor, 45 Am. Rep. 187.....	452
Parks v. Jackson, 11 Wend. 442.....	452
Partridge v. McKinney, 10 Cal. 181.....	219
Payne v. Sheldon, 63 Barb. 169.....	48
Pease v. Cole, 53 Conn. 53.....	491
People v. Brooks, 22 Ill. App. 594.....	158
People v. Carlton, 115 N. Y. 623.....	78
People v. Coughlin, 44 Pac. 94.....	86
People ex rel. Crawford v. Lothrop, 3.....	476
People v. Gillespie, 47 Ill. App. 522.....	118
People v. Hoover, 92 Ill. 575.....	118
People v. Keyser, 53 Cal. 184.....	6
People v. Martin, 60 Cal. 153.....	146, 148
People v. Pool, 27 Cal. 573.....	79
People v. Williams, 18 Cal. 195.....	10
Perkins v. Stemmell 114 N. Y. 359.....	155
Peterson v. Railroad Co., 16 S. C. 843.....	299
Petring v. Chrysler, 90 Mo. 649.....	580
Phelps v. Piper, 67 N. W. 755.....	567
Phillips v. Curtis, 38 Pac. 405.....	511
Pickering v. Whiting, 47 Iowa 242.....	486

Pitts v. Allen, 72 Ga. 69.....	351
Pollock v. Trust Co., 157 U. S. 429.....	142
Porter v. Brooks, 35 Cal. 199.....	565
Porter v. Clark, 6 Mont. 246.....	252
Postlewait v. Howes, 3 Iowa, 365.....	48
Power v. Gum, 6 Mont. 5.....	241
Pray v. Hegeman, 98 N. Y. 357.....	40
Priest v. Brown, 35 Pac. 323.....	501
Probate Judge v. Stevenson, 55 Mich. 320.....	157, 162
Proctor v. Jennings, 6 Nev. 83.....	222
Quehl v. Peterson, 47 Minn. 13.....	26
Quinn v. Quinn, 81 Cal. 14.....	491
Railroad Co. v. Baugh, 149 U. S. 363.....	297
Railroad Co. v. Charless, 16 Sup. Ct. 848.....	302
Railroad Co. v. Hambly, 154 U. S. 349.....	299
Railroad Co. v. Keegan, 160 U. S. 250.....	300
Railroad Co. v. Ketchum, 27 Conn. 181.....	17
Railroad Co. v. King, 69 Miss. 852.....	118
Railroad Co. v. McCartney, 121 Ind. 385.....	364
Railroad Co. v. Midgeon, 68 Fed. 811.....	214
Railroad Co. v. Peterson, 16 Sup. Ct. 843.....	299
Railroad Co., v. Ross, 112 U. S. 377.....	498
Railroad Co. v. Sage, 65 Ill. 328.....	17
Randall v. Baltimore & Ohio R. R. Co., 109 U. S. 478.....	496, 498
Rector, etc., of Trinity Church v. Vanderbilt, 98 N. Y. 170.....	443
Remington Machine Co. v. Kezertle, 49 Wis. 409.....	417
Reske v. Reske, 51 Mich. 541.....	26
Rex v. Martin, 3 Car & P. 211.....	85
Richardson v. Jones, 58 Ind. 240.....	41
Roper v. Trustees, 91 Ill. 518.....	417
Ross v. Gill, 4 Cal. 250.....	158
Ross v. Sedgwick, 10 Pac. 400.....	501
Ruff v. Rader, 2 Mont. 211.....	409
Rundell v. Lakey, 40 N. Y. 516.....	149
Rutledge v. Crawford, 91 Cal. 534.....	194
Ryan v. Maxey, 17 Mont. 164.....	411
Sackett, In re. 73 Cal. 300.....	496
Sanderson v. Stockdale, 11 Md. 563.....	48
Sands v. Maclay, 2 Mont. 35.....	204
San Francisco Gas Co. v. City of San Francisco, 9 Cal. 467.....	204
Santa Clara Min. Ass'n v. Meredith, 49 Md. 389.....	16
Schwartz v. County Court, 14 Col. 44.....	192
Seibel v. Bath, 40 Pac. 756.....	451
Seibert v. Lewis, 122 U. S. 284.....	99
Settembre v. Putnam, 30 Cal. 490.....	490
Skillman v. Lackman, 23 Cal. 204.....	490
Smith v. Christian, 47 Cal. 18.....	530
Smith v. Harris, 32 Pac. 616.....	196
Smith v. Rankin, 25 Pac. 586.....	501
Smith v. Smith, 79 N. Y. 634.....	40
Southmayd v. Southmayd, 4 Mont. 112.....	489

TABLE OF CASES CITED.

xix

Southwest Lead and Zinc Co. v. Phoenix Ins. Co. 27 Mo. App. 446.....	238
Soyer v. Water Co., 15 Mont. 1.....	238
Stackpole v. Hallahan, 16 Mont. 40.....	509, 547, 567
Starr v. United States, 153 U. S. 614.....	78
State ex rel. Aachen & Munich Fire Ins Co. v. Rotwitt, 17 Mont. 41.....	91
State ex rel. Matts v. G. J. Reek.....	560
State ex rel. Metcalf v Johnson.....	555
State ex rel. Milsted v. Butte City Water Co., 18 Mont. 199.....	335, 567
State ex rel. Pigott v. Benton, 13 Mont. 306.....	255, 542
State ex rel. Russell v. Tooker, 18 Mont. 540.....	553
State ex rel. Sam Tol v. French, 17 Mont. 54.....	137, 140
State ex rel. Woods v. Tooker, 15 Mont. 8.....	137
State ex rel. Woody v. Rotwitt, 18 Mont. 502.....	542, 558
State v. Anderson, 14 Mont. 541.....	81
State v. Baker, 13 Mont. 160.....	61
State v. Black, 15 Mont. 143.....	362, 524
State v. Biggerstaff, 17 Mont. 510.....	80, 86
State v. Cadwell, 16 Mont. 119.....	31
State v. Commissioners of Hancock Co., 11 Ohio St. 183.....	205
State v. Dickerman, 16 Mont. 278.....	241
State v. Fry, 10 Mont. 407.....	362
State v. Gibbs, 10 Mont. 210.....	364
State v. Glenn, 17 Mont. 17.....	62
State v. Jackson, 9 Mont. 508.....	81, 372
State v. Mitchell, 17 Mont. 67.....	137
State v. Northrop, 13 Mont. 534.....	362, 364
State v. O'Brien, 18 Mont. 1.....	567
State v. Owsley, 17 Mont. 94.....	151
State v. Pilgrim, 17 Mont. 311.....	364
State v. Raymond, 12 Mont. 226.....	151
State v. Rotwitt, 17 Mont. 41.....	94, 418
State v. Russell, 13 Mont. 164.....	63
State v. Sears, 43 Pac. 482, 485.....	99, 103
State v. Smith, 2 Strob. 77.....	85
State v. Spalding, 34 Minn. 361.....	78
State v. Weir, 31 Pac. 417.....	507
State v. Whaley, 16 Mont. 574.....	5, 362, 364
Stevenson, In re. 72 Cal. 164.....	599
Stewart v. Budd, 7 Mont. 573.....	241
St. Johns v. Charles, 105 Mass. 262.....	341
St. Joseph Lead Co. v. Simms, 108 Mo. 222.....	481
Stove Co. Shedd, 82 Iowa, 540.....	333
Stove Co. v. Shedd, 82 Iowa, 540.....	90
Strickler v. Railway Co., 125 Ind. 412.....	347
Strong v. Hollon, 39 Mich. 411.....	333
Stroup v. State, 70 Ind. 495.....	158
Sturgis v. Crowninshield, 4 Wheat. 122.....	99
Sumner v. Sawtelle, 8 Minn. 309.....	26
Sweetland v. Olsen, 11 Mont. 29.....	438
Tappan v. Evans, 11 N. H. 311.....	48
Teal v. Walker, 111 U. S. 242.....	99

Territory ex rel. Tanner v. Potts, 3 Mont. 364.....	541
Territory v. Burgess, 8 Mont. 58.....	11, 81
Territory v. Hanna, 5 Mont. 246.....	364
Territory v. Rehberg, 6 Mont. 471.....	371
Territory v. Young, 5 Mont. 245.....	252
Terry v. Anderson, 95 U. S. 628.....	99
Tesson v. Atlantic Mut. Ins. Co., 40 Mo. 33.....	288
Thamling v. Duffy, 14 Mont. 567.....	376
Thayer v. Meeker, 86 Ill. 470.....	432
Thompson In re. 9 Mont. 381.....	13
Thompson v. Lyon, 20 S. E. 812.....	431
Thurmond v. Reese, 3 Ga. 449.....	48
Tillar v. Bass, 21 S. W. 34.....	26
Tillison v. Ewing, 8 South. 404.....	347
Tillotson v. Millard, 7 Minn. 513.....	26
Todd v. Stewart, 14 Col. 286.....	196
Trevaskis v. Peard, 44 Pac. 246.....	215
Tripp v. Brownell, 12 Cush. 376.....	339
Tromans v. Mahlman, 27 Pac. 1094.....	26
Tucker v. Jones, 8 Mont. 225.....	438
Turner v. Adams, 46 Mo. 95.....	48
Twell v. Twell, 6 Mont. 19.....	252, 255
United States v. Huckabee, 16 Wall. 414.....	383
Vall v. Rinehart, 105 Ind. 6.....	40
Valles v. Brown, 27 Pac. 945.....	194
Vaughn v. Dawes, 7 Mont. 360.....	472
Von Hoffman v. City of Quincy, 4 Wall. 535.....	99
Walker v. Thompson, 61 Me. 347.....	90
Warnock v. Harlow, 96 Cal. 294.....	450
Warren v. His Creditors, 28 Pac. 257.....	501
Washington Home of Chicago v. City of Chicago, 157 Ill. 414.....	173
Wastl v. Montana Union Ry. Co., 17 Mont. 213.....	62
Water Co. v. Powell, 34 Cal. 109.....	220
Watkins v. Glenn, 40 Pac. 316.....	109
Weed v. Village of Ballston, 76 N. Y. 329.....	406
Wells, Fargo & Co. v. State Board of Equalization, 56 Cal. 194.....	481
Wesling v. Noonan, 31 Miss. 602.....	431
Wethey v. Kemper, 17 Mont. 491.....	166, 442
Whelan v. Reilly, 61 Mo. 565.....	431
Whipple v. Pope, 33 Ill. 334.....	466
Whitney v. Blackburn, 17 Or. 564.....	196
Whitney v. Whitman, 4 Mass. 508.....	156
Wicke v. Ins. Co., 90 Iowa 4.....	364
Wiggin v. Fine, 17 Mont. 575.....	493
Wilder v. Campbell, 43 Pac. 677.....	109
Wilmington, etc., R. R. Co. v. Sing, 18 S. C. 116.....	417
Wilson v. Lucas, 43 Mo. 230.....	195
Wood v. Babb, 16 S. C. 427.....	431
Woods v. Berry, 7 Mont. 195.....	363
Wood v. Currey, 57 Cal. 209.....	346
Woody v. Jamison, 40 Pac. 61.....	326
Wortman v. Kleinschmidt, 12 Mont. 316.....	536
Wright v. Fawcett, 42 Tex. 203.....	194
Young v. Marshall, 8 Bing. 43.....	339
Zickler v. Deegan, 16 Mont. 200, 198.....	529, 531
Zoller v. McDonald, 23 Cal. 136.....	286

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

MARCH TERM, 1896.

PRESENT :

HON. WILLIAM Y. PEMBERTON, Chief Justice.

HON. WILLIAM H. DE WITT, { Associate Justices.
HON. WILLIAM H. HUNT, }

STATE, RESPONDENT, v. O'BRIEN, APPELLANT.

[Submitted March 2, 1896. Decided March 9, 1896.]

CRIMINAL LAW—Appeal—Rulings during progress of trial—Review on appeal from judgment.—Under section 2821, Penal Code, providing that upon an appeal taken by the defendant from a judgment the court may review any intermediate order or "ruling involving the merits or which may have affected the judgment," rulings of the trial court upon matters of law in the exclusion or admission of testimony during the progress of the trial may be brought before this court by bills of exception on an appeal from the judgment without a motion for a new trial; but this section does not permit the review, on an appeal from the judgment only, of matters embraced within any of the cases for which a new trial may be granted under section 2192, *Id.*, except errors in the decision of questions of law during the trial, which may be reviewed either by appeal from the judgment or from an order denying a motion for a new trial. (*State v. Whaley*, 16 Mont. 594, distinguished.)

SAME—Evidence—Impeachment—Witness.—It is error to allow the prosecuting attorney,

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19	6
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for the purpose of impeachment, to testify as to what a witness to the homicide stated at the coroner's inquest, by repeating her statements as taken down in writing by him at the time and stating that she had so stated, where the statements concerning which she was to be impeached had not been first related to her with an opportunity to answer as to their truth or to explain them, nor the written evidence shown to her before putting the questions, as required by section 3380 of the Code of Civil Procedure.

SAME—Same—Motives of defendant.—On a trial for murder, where the killing occurred in defendant's house, the relations existing between the defendant and a woman with whom he was living may be proved by the state as bearing upon the defendant's motives, and as to whether under all the circumstances he acted as a reasonable man.

SAME—Same—Statements by defendant before coroner.—The state should not be permitted to introduce statements by the defendant before the coroner immediately after the homicide, made in ignorance of his lawful rights, without the aid of counsel and under the belief that he was obliged to answer the questions put to him.

SAME—Trial—Objections without merit.—Continual objections by the counsel for the state to questions asked the witnesses for the defendant, many without merit, and made for the purpose of keeping a knowledge of the case on its merits from the jury, is improper practice.

SAME—Reasonable doubt—Instructions.—An instruction as to reasonable doubt, that, if the jury, "or any one of them," entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, the defendant should be given the benefit of the doubt and acquitted, is objectionable in implying that if one jurymen has a reasonable doubt the eleven must concur in acquittal.

SAME—Self defense.—The general doctrine of the right of a man to defend himself, if assailed in his own house, is that he need retreat no further.

SAME—Additional witnesses—Showing required to obtain.—Under section 4636, Penal Code, restricting the state and defendant each to six witnesses, except upon order of the court upon proper showing by affidavit or otherwise, it is proper for the court to require the defendant, upon a request for a subpoena for additional witnesses, to disclose the materiality of their testimony.

REHEARING APPEAL—Bills of exception—Verity.—A bill of exceptions imports verity, and, it being the duty of the trial judge not merely to sign what is presented as a bill of exceptions but to examine it and make it conformable to the facts, the appellate court will assume that a bill, certified by the judge to contain all the evidence bearing upon the exception taken, is correct.

Appeal from Eighth Judicial District, Cascade County.

CONVICTION for manslaughter. The defendant was tried before BENTON, J. **Reversed.**

Statement of the case by the justice delivering the opinion.

The defendant was indicted for murder in the first degree, and convicted of manslaughter, in the killing of one Frank Bixby, in Cascade county, on August 18, 1895. He appeals from the final judgment of conviction. The information charges that the killing was done with a rifle.

Leslie & Downing, for Appellant.

I. It was not a proper exercise of judicial authority for

the court to demand of the defendant in the first instance that he disclose his defense. The two persons for whom a subpoena was requested, were essential and important witnesses for the defendant on the trial of said cause, and the refusal of the court to permit a subpoena to be issued for them, was a denial of justice and we think in conflict with sections 6 and 16, article III of the state constitution.

II. The cross-examination of the defendant in regard to his evidence before the coroner's jury under the circumstances in which it was extracted from him was extremely prejudicial to the defense. There is no question but what the statements made by the defendant such as they were, were not voluntary, were made under duress, without counsel, without being advised as to his rights, and without opportunity afforded him to consult with an attorney. While this evidence was withdrawn, its effect upon the jury could not be withdrawn. (*People v. McMahon*, 15 N. Y. 384; 1 Greenleaf on Evidence (12th Ed.) §§ 224, 225; *People v. Mordeau*, 8 N. E. 496; 1 Wharton on Evidence (7th Ed.) § 690.) At all events the foundation for the introduction of such evidence should have been laid by preliminary proof showing *prima facie* that the confession, if such it could be called, was freely and voluntarily made. (*People v. Soto*, 49 Cal. 69; *People v. Yeaton*, 17 Pac. 544.)

III. The cross-examination of Minnie O'Brien was improper. It did not relate to her evidence in chief, and the object and purpose of the evidence was to injure and prejudice the defendant. (*State v. Gleim*, 17 Mont. 17.)

IV. The questions put to the prosecuting attorney for the purpose of impeaching Mrs. O'Brien were improper. No such questions were asked her by the prosecution while she was on the stand. (*State v. Hunsaker*, 16 Pac. 605; *People v. Devine*, 44 Cal. 432; 1 Thompson on Trials, §§ 501, 502; § 3380, Code of Civil Procedure.)

V. The court having charged that a man assailed unlawfully in his own house is not obliged to retreat under any circumstances, it was error to charge in the same instruction that

it must appear from the evidence that the danger to the defendant was so pressing and urgent that in order to save his own life, or prevent his receiving great bodily harm the killing of the deceased was absolutely necessary. (*State v. Middleham*, 17 N. W. 446; 2 Wharton on Criminal Law (7th Ed.) § 1024.) If the court gives an instruction, correctly stating the law, and afterwards another nullifying the first, the judgment will be reversed. (*People v. Campbell*, 30 Cal. 313; *People v. Simons*, 60 Cal. 73; *People v. Anderson*, 44 Cal. 69; *Territory v. Owings*, 3 Mont. 137.) Where on a trial for murder, two parts of the charge of the court to the jury are contradictory, and one is correct and the other is erroneous, the judgment of conviction will be reversed, even though the appellate court may be satisfied from the evidence that the jury ought to have found the defendant guilty. (*People v. Valencia*, 43 Cal. 552; *People v. Wong Ah Ngow*, 54 Cal. 154.)

Henri J. Haskell, Attorney General and *Ella K. Haskell*, for the state, Respondent.

HUNT, J.—1. This appeal being from a judgment, and the record containing bills of exception, but no motion for a new trial, it is argued in behalf of the state that this court has no jurisdiction to pass upon the errors alleged in the exclusion and admission of certain testimony during the progress of the trial. But this appeal is taken since the adoption of the Penal Code of 1895.

Under the former Code (§ 394, page 476, Comp. St., 1887), an appeal to the supreme court could be taken by the defendant as a matter of right from any judgment against him, and upon appeal any decision of the court or intermediate order made in the progress of the case could be reviewed. The interpretation placed upon that statute was that errors of law in the admission or exclusion of illegal or legal evidence must have been called to the attention of the district court by motion for new trial, to the end that that court should thereby first have an opportunity to correct its own errors before an

appeal lay to this court. (*State v. Whaley*, 16 Mont. 574.) But the Penal Code of 1895 provides as follows: Section 2270: "An appeal to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him." Section 2321: "Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment."

Section 2321 is identical with section 1259 of the Penal Code of California. The difference between section 394 of the Code of 1887 and section 2321 of the Code of 1895, consists in this: Under the old Code, the appellate court was limited in its review to any decision of the court or any intermediate order made in the progress of the case; under the new Code, upon appeal from a judgment, the court may review not only any intermediate order, but likewise *a ruling involving the merits, or which may have affected the judgment*. In the use of the word "ruling" the legislature evidently intended to permit a review of the actions of the district court upon matters of law in the exclusion or admission of testimony involving the merits of the case on an appeal from the judgment only. Such rulings had not been included in the interpretation of the words "decision or intermediate order" in the older statute; that is, a distinction has been recognized between a decision and a ruling. The older statute is therefore to be distinguished from the new. In the one, a decision or order was regarded as a determination by the court in the settlement of the controversy or matter before it; while in the new Code a ruling means generally a settlement or decision of a point of law arising upon the trial of the case, without necessarily the force or solemnity of a judgment or order. (Black, Law Dict.; Cent. Dict.)

We do not hold that under section 2321, above cited, matters may be reviewed on appeal from a judgment only when they are embraced within any of the provisions of the law made for granting new trials (section 2192), except errors in the decision of questions of law arising during the course of the trial.

not exceeding one hundred and sixty acres used for agricultural purposes, and the dwelling house thereon, and its appurtenances, to be selected by the owner thereof, and not included in the town plot, city, or village; or, instead thereof, at the option of the owner, a quantity of land not exceeding in amount one-fourth of an acre, being within a town plot, city, or village, and the dwelling house thereon, and its appurtenances, owned and occupied by any resident of this territory, shall not be subject to forced sale on execution or any other final process from a court: *provided*, such homestead shall not exceed in value the sum of two thousand five hundred dollars."

Our statute is exactly the same as that of Minnesota. The courts of that state hold that actual occupancy is necessary to constitute a homestead in land. (*Quehl v. Peterson*, 47 Minn. 13, 49 N. W. 390; *Tillctson v. Mollard*, 7 Minn. 513 (Gil. 419); *Sumner v. Sawtelle*, 8 Minn. 309 (Gil. 272); *Kelly v. Baker*, 10 Minn. 124 (Gil. 154); *Kresin v. Mau*, 15 Minn. 116; *Kelly v. Dill* 23 Minn. 435.)

Under a similar statute to ours the supreme court of California, in many decisions, holds that actual occupancy is necessary to acquire a homestead in land. (*Gregg v. Bostwick*, 33 Cal. 220; *Villa v. Pico*, 41 Cal. 469; *Babcock v. Gibbs*, 52 Cal. 629; *Lubbock v. McMann*, 82 Cal. 226, 22 Pac. 1145; *Tromans v. Mahlman* (Cal.) 27 Pac. 1094. See, also, *Tillar v. Bass* (Ark.) 21 S. W. 34; *Hotchkiss v. Brooks*, 93 Ill. 386; Thompson on Homesteads and Exemptions, §§ 100-105; Waples on Homesteads and Exemptions, pp. 176-186.)

In *Bonner v. Minnier*, 13 Mont. 269, 34 Pac. 30, the authorities are collated on this subject. While in this case there was a dissenting opinion, there was no difference of opinion that under our statute occupancy was necessary to acquiring a homestead in land. The authorities are too numerous to cite which hold that an intention to claim and occupy land as a homestead is not sufficient to constitute a homestead.

Counsel for appellant rely upon *Reske v. Reske*, 51 Mich. 541, 16 N. W. 895, in which case actual occupancy was not required. But in *Reske v. Reske* the claimants had fenced the

lot which was procured for a home. They were proceeding to improve and occupy it to the extent of their means; they had their domestic animals on it; they came to live in the immediate vicinity of the lot; they dug a well; they put up out-buildings. Everything but building the dwelling was done before levy. Here something more had been done and was being done by the claimants than merely declaring their intention to claim and occupy the land in question as a homestead. So in the other cases cited by appellant. In the case at bar appellant had done, at the time of levy, nothing, except to declare his intention to claim and occupy the land in controversy as a homestead, nor does it appear that he has done anything since towards improving or occupying the land as a homestead. We think it may be said that, according to the great weight of authority under statutes like ours, the mere declaration of an intention to claim land as a homestead is insufficient to constitute the land a homestead.

The appellant, during the trial objected to the introduction in evidence of the papers constituting the judgment roll in the suit to foreclose the mortgage mentioned in the statement, and assigns their admission as error. It was competent to introduce these papers to show the indebtedness of defendant Julian F. Burd to the plaintiffs as alleged in the complaint. Counsel for appellant contends that, as Julian F. Burd's wife was a party to the suit to foreclose the mortgage, she should also have been a party to this suit. We do not think so. Since we have seen that the claim of homestead in the lands in controversy made by defendant Burd cannot be sustained, his wife has no interest in this suit which renders her a necessary party. It is not contended that the judgment in the mortgage suit, spoken of above, is void, or that any of the proceedings to carry said judgment into effect were void. The judgment and proceedings in that case cannot, therefore, be collaterally attacked in this case.

The judgment roll in the mortgage case was admitted in evidence in this case to establish the indebtedness of defendant Julian F. Burd to plaintiffs. For that purpose it was competent.

The homestead filing on public lands by defendant Burd, made in 1887, was properly admitted in evidence, as tending to show whether or not appellant's claim of homestead in the lands in controversy was made in good faith.

We are of the opinion that this case was fairly tried, and the proper result reached. The judgment appealed from is affirmed.

Affirmed.

DE WITT and HUNT, JJ., concur.

BENNETT, APPELLANT, v. TILLMON, RESPONDENT.

[Submitted March 5, 1896. Decided March 9, 1896.]

PROMISSORY NOTES—*Parol agreement as to payment—Evidence.*—A parol agreement between the defendant and one acting as agent for the plaintiff and B., entered into at the time of the execution of certain notes given in consideration of the purchase of property by the defendant from B, that the notes should be paid by being credited upon an account which B owed the defendant, is not an agreement changing the terms of the note, but is a reservation by the defendant of the right to pay them by offsetting B's indebtedness to him, and may therefore be pleaded in defense to an action on the notes. (*Bohn Manufacturing Co. v. Harrison*, 13 Mont. 239, cited.)

TRIAL—Amendments—Pleading.—The allowance of an amendment to a pleading during a trial is largely a matter of discretion and will not be held ground for reversal where it does not appear that a postponement of the case was requested or made necessary, or that the appellant was injured thereby.

Appeal from Fourth Judicial District, Missoula County.

ACTION on promissory notes. The cause was tried before WOODY, J. Defendant had judgment below. Affirmed.

Statement of the case by the court.

This is a suit on three promissory notes. The answer admits the execution of the notes, and alleges that they were given in consideration of the purchase by defendant of certain improvements on real estate belonging to one G. A. Bennett; that said improvements were sold to defendant by L. J. Warner, the agent of said G. A. Bennett; that said Warner induced defendant to execute two of the notes, for \$250 each.

directly to him (Warner), and the \$500 note to the plaintiff; that Warner was agent for G. A. Bennett, as well as for the plaintiff; that, at the time of the execution of the notes, G. A. Bennett was indebted to defendant on the account set out in the answer in the sum of \$1,224.50; that the said Warner, as agent of plaintiff and G. A. Bennett, agreed that said notes should be offset by said account; that said notes were given as a memorandum of the sale of said improvements to defendant, and should be paid by being credited and offset with said account. After the execution of the notes, the two executed to Warner were by him assigned to plaintiff.

The plaintiff moved for judgment on the pleadings. The motion was denied. The allegations of the answer are denied by replication. The case was tried to a jury, who returned a verdict for the defendant. From the judgment entered in accordance with the verdict, and an order refusing a new trial, the plaintiff appeals.

Bickford, Stiff & Hershey, for Appellant.

PER CURIAM.—The plaintiff contends that the answer contains no defense, in that it attempts to vary a written contract by the oral agreement to allow the account pleaded to be offset against and credited upon the notes. This was the ground for plaintiff's motion for judgment on the pleadings, and of his objection to the introduction of any testimony in relation to said agreement.

We do not think the oral agreement, set up in the answer, that G. A. Bennett's account or indebtedness to defendant was to be offset against or credited on the notes, is an attempt to vary the terms of the written contract as contended. The agreement contained in the answer as to the G. A. Bennett indebtedness or account amounted, in effect, to this: That the defendant, by executing the notes, did not waive the right to set up his accounts against G. A. Bennett against the notes. This in no way altered, changed, or varied the terms of the

notes. It was only a reservation of the right by defendant to pay them by setting up G. A. Bennett's indebtedness to him as a counterclaim.

In *Bohn Manufacturing Co. v. Harrison*, 13 Mont. 293, this court held that "parol evidence of an agreement that the acceptance of a bill of exchange should not be a waiver of counterclaims which the acceptor then held against the drawer is admissible in an action on the bill, as such evidence contradicts, not the instrument, but merely the presumption of waiver which arises from the fact of its acceptance." We think this case is directly in point, and decisive of the case at bar.

The appellant assigns as error the action of the court in allowing defendant to amend his answer during the trial. The allowing of an amendment at any stage of the case is a matter largely within the discretion of the court. It does not appear that, by reason of the amendment, a postponement or continuance of the case was rendered necessary, or that appellant made any request therefor. It is not shown how the appellant was injured, or in what respect the court abused its discretion by allowing the amendment.

We think no errors have been shown which would authorize a reversal of the case. The judgment and order appealed from are affirmed.

Affirmed.

ENGESSER, APPELLANT, v. THE NORTHERN PACIFIC RAILROAD COMPANY, RESPONDENT. 18 31
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[Submitted March 13, 1896. Decided March 16, 1896.]

APPEAL—*Appearance through disbarred attorney.*—Where an appellant's only appearance in the supreme court is by the brief of an attorney who, since the appeal, has been disbarred for dishonorable and unprofessional conduct, the appeal will not be considered and the judgment therefore affirmed.

Appeal from Sixth Judicial District, Park County.

JUDGMENT was rendered for the defendant below by HENRY, J. Affirmed with leave to reinstate.

Campbell & Stark and Cullen & Toole, for Respondent.

PER CURIAM.—The appellant appears in this court by brief filed by E. P. Cadwell as his only attorney. Since the case was appealed from the district court, said Cadwell has been disbarred from the practice of law in this state. (*State v. Cadwell*, 16 Mont. 119.)

We do not feel that it is the duty of the court to consider appeals where the appellant's contention is presented solely by the brief of an attorney who has been disbarred for dishonorable and unprofessional conduct. The judgment is therefore affirmed. (Rule 5, subdivision 6, Rules of Supreme Court.)

The clerk is directed to notify the party apparently represented by said Cadwell of this order, and also the clerk of the district court in which the judgment was rendered, to the end that the party may be notified of the order of this court. If, within 60 days from the date hereof, good cause is shown for reinstating this appeal, the same may be done upon further order of this court.

Affirmed.

STEBBINS, APPELLANT, v. MORRIS, RESPONDENT.

[Submitted March 11, 1896. Decided March 16, 1896.]

APPEAL—*Brief of disbarred attorney.*—The supreme court will decline to consider a brief filed by an attorney, who has been disbarred since the taking of the appeal. (*Engesser v. Northern Pacific Railroad Co.*, ante, page 31, cited.)

Appeal from Ninth Judicial District, Gallatin County.

JUDGMENT was rendered for the defendant below by **ARMSTRONG, J.** Affirmed with leave to reinstate.

Statement of the case by the justice delivering the opinion.

This action is brought by the plaintiff and appellant for an accounting, and to recover moneys alleged to be due from the defendant and respondent under the terms of the following contract:

“This article and deed of separation, made and entered into this 20th day of June, A. D. 1885, by and between Robert O. Morris, husband, of Gallatin County, Montana territory, party of the first part, and Ellen M. Morris, wife, of the same county and territory, party of the second part, witnesseth: That, for and in consideration of the sum of one dollar, in hand paid by the said first party to the said second party, and other and divers considerations hereinafter mentioned, they have by these presents agreed, and by these presents do agree, for the rest of their natural lives, to live separate and apart from each other, and to renounce and surrender each to the other all of the marital rights. And it is agreed and understood that the said first party is to pay to the said second party the sum of one hundred dollars on the 20th day of October, 1885, and the further sum of two hundred dollars on the 20th day of March, 1886. And it is further agreed and understood, by and between the parties hereto, that the party of the first part, or his agent, J. L. Morris, of McKean county, Pennsylvania, or any other agent the said first party may here-

after select to act for him, shall pay to the said second party the one-half of the net proceeds arising from the sale of oil on what is known as the Morris homestead, in Bradford township, McKeen county, Pennsylvania, to the extent of the interest now owned by the said Robert O. Morris in the oil wells upon said land, the one-half of all the proceeds due the said first party arising from the sale of oil as aforesaid to be paid monthly, as often and immediately upon a sale of said oil being made, and as long as oil is produced upon the aforesaid tract of land. And it is further provided that the said first party shall have and make no claim for the services of the party of the second part, and shall not be liable for her support and maintenance, or for any debts hereafter contracted by her. That the said party of the second part agrees to release, and does hereby release, all claim of dower or other demands against the personal or real estate of the said party of the second part. In witness whereof the said parties have hereunto set their hands and seals the day and year first above written. [Signed] Robert O. Morris. [Seal.] Mrs. E. M. Morris. [Seal.]” Acknowledged according to the laws of the state of Montana.

On the 20th day of June, 1885, at the time the contract was entered into, the respondent and appellant were husband and wife. A divorce was granted to plaintiff on the same day, after the signing of the contract. The contract is attached to the complaint, and made a part thereof. The defendant filed a general demurrer to the complaint, alleging that the complaint did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the district court. The plaintiff elected to stand upon her complaint, whereupon judgment was entered for the respondent. Plaintiff appeals.

Campbell & Stark, for Respondent.

HUNT, J.—The appellant’s side of this case has not been presented to the court, except by a short brief filed by E. P. Cadwell, who has been disbarred from practicing law in this state since this appeal was taken. We decline to consider this brief. (*Engesser v. Railroad Co.*, ante, p. 31.)

The respondent has presented his views by able argument and brief, contending that the agreement between the husband and wife, set forth in the statement of the case, is void, as against public policy, and because it was made directly between the husband and wife prior to the married woman's act of 1887. (Compiled St. 1887.) He cites many decisions to sustain his contention, but their reasoning is not altogether satisfactory to us upon the proposition that the whole contract is void.

It would seem to be correct that the bargaining for the separation is nugatory, under the weight of authority, upon the ground that marriage is a public institution as well as a private one, and those who have entered into the marital relations cannot, by mere consent and agreement, set aside that contract, or create a separation. But, from our original examination into the question, we are not satisfied that, where a husband and wife enter into articles of separation, apparently in good faith, in which the husband agrees to give the wife certain moneys and personal property by way of provision for her maintenance, and immediately thereafter they do separate, and he procures a divorce, the wife may not institute a suit for equitable relief, to have the husband carry out his contract to maintain her as provided for. The following authorities hold she may: Bish. Mar. Div. & Sep. §§ 1268-1312; *Bettle v. Wilson*, 14 Ohio, 257; *Calkins v. Long*, 22 Barb. 97. And it is held that such an agreement is valid, directly between husband and wife, without the intervention of a trustee; for equity will regard the husband as a trustee for the specific purpose of the agreement for maintenance. (*Com. v. Richards*, 131 Pa. St. 209, 18 Atl. 1007; *Hutton v. Hutton's Adm'r*, 3 Pa. St. 100; Schouler, Dom. Rel. (5th Ed.) § 218; *Dutton v. Dutton*, 30 Ind. 452.)

The question of legal and illegal conditions in agreements of separation is of more than usual importance, as reference to the books amply proves, and we hesitate to decide it for the first time in this state without the benefit of the aid of counsel for both sides.

Its discussion has already occasioned "judicial confusion," according to Schouler, and, in our opinion, that confusion should not be increased nor decreased without very careful consideration. But, the appellant not being represented in this court by counsel or by brief which can be considered, the judgment of the district court will be affirmed.

If the appellant desires, in good faith, to present her case, she may, upon good cause to be shown to the court, move to reinstate her appeal within 60 days from the date hereof.

Affirmed.

GASSERT, RESPONDENT, v. BLACK ET AL., APPELLANTS.

[Submitted March 18, 1896. Decided March 23, 1896.]

RES JUDICATA—Mortgages—Foreclosure—Equitable defenses.—Where the defendants in an action to foreclose a mortgage for default in interest, interposed several defenses, one of which was that by reason of a mutual mistake in the mortgage, foreclosure for nonpayment of annual interest was authorized, which was not the intent of the parties whereby the action was prematurely brought, and the jury found for the defendants upon that issue alone, and were instructed that if they did so find they need go no further in the case, the judgment rendered thereupon is not *res judicata* as to the other equitable defenses in a subsequent action brought to foreclose the mortgage upon full maturity of the debt. (*Kleinschmidt v. Binzel*, 14 Mont. 31, cited.)

MORTGAGES—Foreclosure—Pleading.—A determination that a mortgage did not express the intention of the parties in authorizing foreclosure upon default in interest, and that the action was therefore premature, does not require a subsequent action, instituted upon the maturity of the entire debt, to be brought as upon a reformed mortgage.

APPEAL—Error—Evidence.—Possible error in the admission and exclusion of testimony as to assays of ores, is not ground for reversal where the value of the ores was considered by the jury and their finding upon the matter was not attacked. (*Merchant's National Bank v. Greenwood*, 16 Mont. 395, cited.)

Appeal from Sixth Judicial District, Park County.

FORECLOSURE of mortgage. Judgment was rendered for the plaintiff below by HENRY, J. Affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiff obtained judgment against the defendants for \$13,334 upon a promissory note, and also for the foreclosure

of a mortgage upon certain real estate, given by the defendants to secure said note. A better view of the facts of the case will be obtained by referring to the case of *Gassett v. Black*, 11 Mont. 185. In that case the plaintiff herein brought action against the defendants herein upon the same note and to foreclose the same mortgage. In that case the appeal was taken by defendants from a judgment rendered in favor of plaintiff upon the sustaining of plaintiff's demurrer to the answer and cross complaint of defendants. The statement of the case in the former decision gives a very full view of the defense set up in that case. We there held that the defense stated was sufficient, and sent the case back to trial. After *remittitur* filed in the district court, the plaintiff filed a reply, and upon that reply, together with the pleadings described in 11 Mont. 185, the case was tried. It is to be observed that equitable defenses were set up against the action on the note. Upon that trial the court submitted nine findings. Those findings covered the equity issues made by defendants' answer. One of these defenses was that there was a mutual mistake in the execution of the mortgage, and that, while the mortgage provided that if the interest for any year were not paid the whole mortgage should be at once due, in truth and in fact the real agreement between the parties was not that the default in a year's interest should cause the whole principal debt to be due. The defense upon which the action was determined was that it was prematurely brought, in that the mortgage did not express the real intent of the parties and that, when the real intent was ascertained, the mortgage would not then be due. The note was a four-year note, dated December 9, 1888. The old action (11 Mont.) was commenced just after the default in paying the interest on December 9, 1889.

The three first findings, with their answers, submitted on the trial of the old case were as follows :

“(1) Does the note and mortgage express the intention of the parties at the time it was executed? Answer. No.

“(2) Was there any mistake in the execution of the mort-

gage in authorizing its foreclosure upon nonpayment of the annual interest? Answer. Yes.

“(3) If your answer to the foregoing interrogatory be in the affirmative, was such mistake in the execution of such mortgage mutual? Answer. Yes.”

When submitting these findings 1, 2 and 3, the court, before submitting the further findings, instructed the jury as follows: “If your answers to the two last foregoing interrogatories be in the affirmative and the first in the negative, you need go no further in your investigations, but will return your verdict accordingly.”

On that trial the jury also found a general verdict, in which they said: “We, the jury in the above-entitled action, find the issues for the defendants.” That was the end of that case. Nothing further occurred until the expiration of the four-year term of the note. Then the plaintiff commenced the action now at bar, asking for judgment on the note, with interest and costs, and the foreclosure of the mortgage. The defendants set up the same equitable defenses as they pleaded in their answer in the former case (see statement 11 Mont. 185) except the defense of nonmaturity of the debt.

Judgment in this case was rendered as prayed for by plaintiff. The defendants moved for a new trial, which was denied. From that order, and the judgment, they appeal.

Toole & Wallace and Hartman & Hartman, for Appellants.

On the question of *res judicata* we submit that the jury having been instructed fully upon every issue in the former case, and having found the issues for the defendants, and this finding having been incorporated into the judgment of the court, and the court having rendered judgment for the defendants for costs, that the issues thus decided for the defendants could not be again litigated in the case at bar. (*Griffin v. Long Island R. Co.*, 102 N. Y. 449, citing *Pray v. Hegeman*, 98 N. Y. 351; *Jordan v. Van Epps*, 85 *Id.* 427, 436; *Smith v. Smith*, 79 *Id.* 634; *Clemens v. Clemens*, 37 *Id.* 59, 74. See, also, *Bigelow v. Winsor*, 1 Gray 299; *Vail v. Rinehart*, 105

Ind. 6, citing *Fischli v. Fischli*, 1 Blackf. 360; *Richardson v. Jones*, 58 Ind. 240; *Elwood v. Beymer*, 100 Ind. 504; *Bailey v. Bailey*, 115 Ill. 551, citing *Rodgers v. Higgins*, 57 Ill. 244; *Patrick v. Shaffer*, 94 N. Y. 423, citing *Kerr v. Hayes*, 35 N. Y. 331; *Wilder v. Case*, 16 Wend. 483; *Cromwell v. County of Sac*, 94 U. S. 351.) In short, the general rule seems to be that if it is desired to avoid barring any issues which might be raised in a subsequent case, care should be taken to have the court or jury render a verdict only upon the issues particularly involved, and not give a general verdict. If a case includes a variety of issues which are submitted to the jury at the trial, with sufficient evidence to establish them, it will be *prima facie* proof, that all these issues have been determined and included in, and concluded by the verdict, if such a verdict is a general one, which presumably covers every point involved in the case. (21 Am. & Eng. Ency. of Law, page 200 b. and citations.) We submit that the record in this case, shows that it comes within the above authorities and that, therefore, the judgment roll in the case commenced Dec. 24th, 1889, should have been admitted in evidence in bar of this action, for clearly that case, in which the judgment was rendered for the defendants, included a variety of issues, all of which were submitted to the jury at the trial, with sufficient evidence to establish them, and therefore those issues were included in, and concluded by the verdict of that jury, which was a general one, and which presumably covered every point involved in the case. And every issue which was submitted to the jury in the former case, and upon which they were instructed by the court, was contained in the pleadings in this case, submitted to the jury, and instructed upon by the court.

Savage & Day and A. J. Campbell, for Respondent.

The record offered shows that there were before the court on the former trial two kinds of issues, one upon the merits, which are the same as those in issue in this action, the other a

jurisdictional or technical question. If the mortgage was, according to the understanding of the parties, not to be foreclosed for nonpayment of interest prior to the maturity of the principal debt, then the court had no jurisdiction to determine the other issues—the action was prematurely brought for the reason that the debt to secure which the mortgage had been given was not yet due, and the other issues were not litigated and could not have been litigated, in the sense in which the word is used, although evidence in support of them was presented to the jury. In order to bar the plaintiff's claim it must appear that he had a legal right to bring his action therefor when his suit was brought and that, in the litigation had, the merits of his claim were passed upon in giving judgment. (*Tucker v. Rohrback*, 13 Mich., 73; *Wood v. Faut*, 55 Mich. 185; *Gray v. Dougherty*, 25 Cal. 266.)

To be a bar to future proceedings, it must appear that the former judgment necessarily involved the determination of the same fact to prove which it is offered in evidence. It is not enough that the question was in issue in the former suit; it must also appear to be precisely determined. Where in the answer various matters of defense are set forth, some of which relate to the maintenance of the action, and others to the merits and there is a general decree of dismissal it is impossible to hold that the decree is a bar to a future action. (*Foster v. The Richard Busteed*, 100 Mass. 409.)

In an action on four counts, if the judge withdraws three of them from the jury, a verdict on the fourth count does not bar another action for any matter involved in the rejected count, though evidence in regard to such matter was introduced. (*Boston Blower Co. v. Brown*, (Mass.) 21 N. E. Rep. 883.)

Where the record shows that there were submitted for determination several issues, some going to the merits and others to the form, and it neither appears from the record nor by extraneous evidence that the former adjudication was on the merits, the former judgment is not an estoppel; and in the absence of such showing it will be presumed to have been

rendered on the defects in form. (*Kleinschmidt v. Binzel*, 14 Mont. 31.)

DE WITT, J.—The only point of importance in the case is as follows: Without stating in detail the method by which the question was raised, it is sufficient to say that the defendants contended that the judgment in the former case was *res adjudicata* upon this trial, for the reason that the equitable defenses set up in this case were also pleaded in the former case, and that in the former case, the jury found the issues for the defendants, and, as the equitable issues were submitted to the jury, the judgment is *res adjudicata* as to everything before the jury and the court at that time. In this contention the district court held against defendants. Hence their appeal.

Appellants cite many cases, like *Griffin v. Railroad Co.*, 102 N. Y. 449, 7 N. E. 735, wherein the opinion says: "The rule is well settled that a former judgment of a court of competent jurisdiction is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have decided, as incident or essentially connected with the subject-matter of the litigation within the purview of the original action, either as matter of claim or of defense. (*Pray v. Hegeman*, 98 N. Y. 351; *Jordan v. Van Epps*, 85 N. Y. 427, 436; *Smith v. Smith*, 79 N. Y. 634; *Clemens v. Clemens*, 37 N. Y. 59, 74.)"

Also, an opinion of Chief Justice Shaw in *Bigelow v. Winsor*, 1 Gray, 299, in which the learned justice says: "It is no objection that the former suit embraced more subjects of controversy or more matter than the present. If the entire subject of the present controversy was embraced in it, it is sufficient. It is *res judicata*."

Appellants also rely upon *Vail v. Rinehart*, 105 Ind. 6, 4 N. E. 218, in which the court says: "Under repeated decisions of this court, from its earliest organization down, the adjudication of the Dearborn circuit court against the appellee in such prior suit is a final determination against him, not only as to what was actually decided therein, but also as to every

other matter which the parties might have litigated in the case, and especially as to the alleged lien which the appellee asserts and seeks to enforce in the case at hand against the decedent's land in Pulaski county. (*Fischli v. Fischli*, 1 Blackf. 360; *Richardson v. Jones*, 58 Ind. 240; *Elwood v. Beymer*, 100 Ind. 504.)"

Such cases might be indefinitely multiplied as this principle will be found very frequently stated in the decisions. But these cases are wholly inapplicable to the facts of the former case of *Gassett v. Black*. Not only were the present equitable defenses not decided in the other case (11 Mont. 185) but the record of that trial shows, expressly and affirmatively, that they were not litigated. By the instructions of the court and the findings of the jury, the present equitable issues were never reached upon that trial. Instead of there being any presumption that they were passed upon by the jury, there is affirmative showing that they were not. That case was decided solely upon the ground that the action was prematurely brought; and that plaintiff had no right to sue upon the note and foreclose the mortgage for the default in a year's interest. It was decided upon the ground that the mortgage did not express the intention of the parties when it provided that the debt should be due if any year's interest were in default. This proposition was expressly submitted to the jury when the court told the jury that, if they answered interrogatory No. 1 "No," and interrogatories Nos. 2 and 3 "Yes," they should go no further in the case. The jury did answer the interrogatories in just this way, and they went no further, and they made no findings upon the other equitable defenses submitted. It is true that they found a general verdict for defendants; but that was a matter of no consequence, as it was controlled by the special findings. Therefore, by the instructions of the court, the equitable issues in this case presented were wholly withdrawn from the jury in the other case, as being immaterial in the event that the jury decided the case upon the ground that the action was prematurely brought. They did decide it upon that ground, and that ground only.

The district court was therefore correct in its ruling that the former case was not *res adjudicata* upon the equitable issues presented in this case. This view is fully sustained in *Kleinschmidt v. Binzel*, 14 Mont. 31, which decision goes much further than is necessary to hold in sustaining the ruling of the district court now before us.

The question of *res adjudicata* being out of the way, and the question of nonmaturity of the debt not being in issue in this case, the jury went on and made findings on all issues in favor of plaintiff, upon which findings the judgment for the debt and foreclosure of the mortgage was entered.

Appellants also contend that, it having been determined in the former case that the mortgage did not express the intention of the parties, the present action should have been brought as upon a reformed mortgage. But the particular in which it was determined in the former case that the mortgage did not express the intention of the parties was simply that the intention was not that the whole debt should be due upon the default in a year's interest. In the present action that question was out of the case. The whole time of the note had run, and the whole amount was due. There was no possible occasion to introduce into the case the question of reformation which was in issue in the other case.

Appellants also assigned as error some rulings of the court in admitting and excluding testimony in reference to assays made of some ores from the Black Warrior claim. The value of this ore was taken into consideration in the accounting between the parties in this case. We think that respondent answers appellants' contention in this respect, in that he shows that the value of this ore was taken into consideration in the settlement between the parties. The jury found upon this matter, and that finding is not attacked, nor are we asked to set it aside. Therefore, if there were error in the omission or exclusion of the testimony as complained of, we are of opinion that it should not set aside the general result obtained in the case. (*Merchants' Nat. Bank v. Greenhood*, 16 Mont. 395.)

It is ordered that the judgment and the order denying a new trial be affirmed.

Since the filing of this appeal the respondent, Harry Gassert, has died, and his administratrix, Sarah C. Gassert, has been substituted as the party respondent in this court. The *remittitur* will therefore issue in the name of Sarah C. Gassert, administratrix.

Affirmed.

HUNT, J., concurs.

BURTON, APPELLANT, v. LAUGHREY ET AL., RESPONDENTS.

[Submitted March 18, 1896. Decided March 23, 1896.]

RAILROADS—Right of way—Public land—Ejectment.—Mere prior possession of land, which is afterwards included in a grant by congress to a railroad of a right of way of 200 feet on each side of the center of its track, is insufficient to maintain ejectment as against the railroad.

SAME—Use of right of way.—Occupancy of land within the right of way of a railroad company under a license from the company, by which the licensee was permitted to cultivate the same on condition of maintaining lawful fences and keeping the land free from combustible materials, is a use of that portion of the right of way by the railroad.

Appeal from Ninth Judicial District, Gallatin County.

EJECTMENT. Defendant's demurrer to the complaint was sustained by ARMSTRONG, J. Affirmed.

George D. Pease, for Appellant.

Cullen & Toole and *Cockrill & Pierce*, for Respondents.

PER CURIAM.—Plaintiff appeals from the judgment entered against her upon sustaining defendants' demurrer to the complaint. The action is in the nature of ejectment to obtain possession of a strip of land lying along the track of the Northern Pacific Railroad, between a line 50 feet from the center of the track and one 200 feet from the center. The right of way granted to the Northern Pacific Railroad by congress is 200 feet on each side of the center of the track. It appears, by the complaint, that the company gave a license to respondent

Laughrey to occupy the strip above mentioned outside of a line 50 feet from the center of the track. The license agreement was that Laughrey might cultivate the land, and that he should maintain lawful fences thereupon, and should keep the same clear of combustible materials. Plaintiff sought to eject Laughrey and the railroad company from the strip.

We are of opinion that the demurrer was properly sustained, and that the complaint does not set out a cause of action. While the complaint pretends to set up a possession by the plaintiff prior to the grant to the Northern Pacific Railroad Company, yet it does not pretend to connect the plaintiff in any way with the government title prior to the grant to the railroad. Appellant contends that the land is not being used for railroad purposes, and therefore the defendants may not exclude her from its possession.

We think the case of *Pacific Co. v. Burr*, 86 Cal. 279, 24 Pac. 1032, is conclusive against the appellant. The facts were very similar to those now before us. In that case the court said: "Here there was a special grant of a right of way 200 feet in width on each side of the road. The grant is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and it necessarily involves a right of possession in the grantee, and is inconsistent with any adverse possession of any part of the land embraced within the grant. It is true, the strip of land now actually occupied by the roadbed and telegraph line may be only a small part of the 400 feet granted, but this fact is of no consequence. The company may at some time want to use more land for side tracks or other purposes, and it is entitled to have the land clear and unobstructed whenever it shall have occasion to do so."

These views, however, do not treat of the right to take railroad property for another public use. (*Butte, Anaconda & Pacific Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504.)

Furthermore, the company is required by the laws of the state to keep its right of way free from combustible materials. Its contract with Laughrey was to accomplish this purpose,

and also to accomplish the fencing of the right of way to avoid accidents to stock. This was a use of the right of way resulting in the accomplishment of obedience to the laws of the state.

The judgment of the district court is affirmed.

Affirmed.

RYAN, APPELLANT, v. SPIETH ET AL., RESPONDENTS.

[Submitted March 19, 1896. Decided March 23, 1896.]

18	45
20	384
21	404
18	45
36	462

CREDITOR'S BILL—Pleading—Issuance of execution.—A complaint in equity to reach and have applied to a judgment, property of the judgment debtor, alleged to be fraudulently concealed, which shows that there is no property subject to execution and what has become of it, need not also allege as a prerequisite to equitable relief, that an execution was issued and returned unsatisfied.

SAME—Pleading—Presentation of claim to administrator.—A creditor's bill to reach funds of an estate, alleged to have been fraudulently secreted and to require the administrator to personally account therefor in equity, need not allege that the plaintiff's claim was first presented to the administrator for allowance under the rules of probate practice.

SAME—Same—Ownership of judgment.—The plaintiff in a creditor's suit must allege that he is the owner of the judgment and that it is unsatisfied.

APPEAL—Remand—Amendment allowed.—In an equity action where the complaint defectively states what may be a good cause of action and a demurrer to the complaint is sustained for ambiguity, and the plaintiff's counsel elects to stand on the complaint, but after an appeal is taken is disbarred from practice, the supreme court under such circumstances, while approving the ruling of the lower court, will remand the case with leave to amend.

Appeal from Ninth Judicial District, Gallatin County.

CREDITOR'S BILL. Defendant's demurrer was sustained by ARMSTRONG, J. Remanded.

Statement of the case by the justice delivering the opinion.

This is an action in equity, seeking to reach, and have applied to a judgment, assets and property alleged to be fraudulently disposed of and concealed. A demurrer to the complaint was sustained, and judgment accordingly entered for the defendants. Plaintiff appeals.

The demurrer was upon two grounds: (1) That the complaint did not set forth facts sufficient to constitute a cause of action; and (2) that it was ambiguous, uncertain and unintelligible. The complaint is extremely voluminous, and the demurrer equally so. Under the view that we take of this case, and disposition we intend to make of it, it will not be necessary to state the facts at very great length.

It appears by the complaint that on May 5, 1888, and for a long time prior thereto, Jacob F. Spieth and Charles Krug were partners in the brewing and saloon business. Krug died May 7, 1888, intestate. Spieth died April 10, 1892, intestate. J. P. Martin, one of the defendants is administrator of Krug's estate, and Barbara Spieth, the other defendant, is administratrix of Spieth's estate. The plaintiff, on December 29, 1888, recovered judgment against Jacob F. Spieth, the sole surviving partner of the firm of Spieth & Krug, for \$9,026.94,—a judgment in effect against the partnership. Upon the death of Krug, Spieth retained possession of all the firm property, and operated the business and collected all accounts due the firm. The complaint then contains allegations in great detail as to fraudulent conspiracies between Jacob Spieth and Barbara, his wife, to get possession of all the assets of the firm, and put them into the possession of Barbara Spieth for the benefit of her and her husband, and for the purpose of defrauding the creditors of the firm. This conspiracy originated some time within two years before the death of Krug, in 1888, and continued its operations until near the time of the death of Spieth, April 10, 1892.

The complaint states that the firm, in May, 1888, had real and personal property to the value of \$40,000, while they owed \$25,000. It also states that both the Spieth and Krug estates were absolutely insolvent, and no assets whatever were found, and that neither estate paid even the costs of administration. The complaint traces many items of assets of the firm through Jacob Spieth to his wife, Barbara, and states many investments which Barbara had made of money so obtained. For the purpose of this decision it does not seem to be necessary to state the facts any more fully.

Hartman & Hartman, for Appellant.

Luce & Luce, for Respondents.

DE WITT, J.—One ground urged for sustaining the demurrer is that the complaint does not state that an execution upon the original judgment of Ryan against the partnership of Spieth & Krug was ever issued and returned unsatisfied. One of the allegations of the complaint is as follows: “That to issue an execution in this case, and to have it returned, would be productive of no good, and would only incur costs without result; that there is no property of Chas. Krug, Jacob F. Spieth, or Spieth & Krug subject to execution, or that can be found.”

Furthermore, it appears by the complaint, that the partnership of Spieth & Krug, and the individual estates of the two partners, were absolutely insolvent, and that their effects were eaten up by other creditors, and by the alleged embezzlements of Barbara Spieth. There could be no plainer case of the absolute uselessness of an execution. In the case of *Merchants' National Bank v. Greenhood*, 16 Mont. 394, we did not decide whether the issuance of an execution, and its return unsatisfied, were necessary to support a creditors' bill; but we quoted with approval the following from the case of *Case v. Beauregard* 101 U. S. 688.

“It is no doubt generally true that a creditor's bill to subject his debtor's interests in property to the payment of the debt must show that all remedy at law had been exhausted. And, generally, it must be averred that judgment has been recovered from the debt, that execution has been issued, and that it has been returned *nulla bona*. The reason is that, until such a showing is made, it does not appear in most cases that resort to a court of equity is necessary. Or, in other words, that a creditor is remediless at law. In some cases, also, such an averment is necessary to show that the creditor has a lien upon the property he seeks to subject to the payment of his demand. The rule is a familiar one that a court

of equity will not entertain a case for relief where the complainant has an adequate legal remedy. The complaining party must, therefore, show that he has done all that he could do at law to obtain his rights. But, after all, the judgment and fruitless execution are only evidence that his legal remedies have been exhausted, or that he is without remedy at law. They are not the only possible means of proof. The necessity of resort to a court of equity may be made otherwise to appear. Accordingly, the rule, though general, is not without many exceptions. Neither law nor equity requires a meaningless form. '*Bona sed impossibilia non cogit lex.*' It has been decided that, where it appears by the bill that the debtor is insolvent, and that the issuing of an execution would be of no practical utility, the issue of an execution is not a necessary prerequisite to equitable interference. *Turner v. Adams*, 46 Mo. 95; *Postlewait v. Howes*, 3 Iowa, 365; *Bank v. Harvey*, 16 Iowa, 141; *Botsford v. Beers*, 11 Conn. 569; *Payne v. Sheldon*, 63 Barb. 169. This is certainly true where the creditor has a lien or a trust in his favor. So it has been held that a creditor, without having first obtained a judgment at law, may come into a court of equity to set aside fraudulent conveyances of his debtor, made for the purpose of hindering and delaying creditors, and to subject the property to the payment of the debt due him. *Thurmond v. Reese*, 3 Ga. 449; *Cornell v. Radway*, 22 Wis. 251; *Sanderson v. Stockdale*, 11 Md. 563. * * * The foundation upon which these and many other similar cases rest is that judgments and fruitless executions are not necessary to show that the creditor has no adequate legal remedy. * * * But, without pursuing this subject further, it may be said that whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity, without exhausting legal processes or remedies. (*Tappan v. Evans*, 11 N. H. 311; *Holt v. Bancroft*, 30 Ala. 193.)''

In the case at bar it appears by the complaint that there is no property subject to execution as clearly, and indeed more clearly and fully, than it would appear by the

return of an execution. The return of an execution would simply show that the sheriff had not found property. This complaint shows more than that. It makes it appear not only that there is not property subject to execution, but it states in very great detail why there is not such property, and what has become of the property which should have been subject to an execution. We are of opinion that under such facts and circumstances as here disclosed the better rule is that it need not be pleaded or proved that the useless ceremony of the issuing of an execution has been resorted to. The complaint was, therefore, not defective in this respect.

The defendants further contend that the complaint is fatally defective in that it does not appear that plaintiff's claim against the firm of Spieth & Krug has been presented to the administratrix of the Spieth estate under the rule of probate practice. But in this action no relief is sought against the administratrix. Barbara Spieth is named as administratrix in the title of the case, and alleged to be such in the body of the complaint, but the relief sought against her is strictly personal. She is charged with embezzlement and conversion of the funds of the estate, and the prayer is that she be made to account for them in equity. The question is not one of a claim to be presented to an administrator for an allowance, but is rather an effort to require a person who has converted the funds of an estate to account to a creditor of the estate. (*Krueger v. Spieth*, 8 Mont. at page 489.)

Again, appellant contends that the complaint is defective in that it does not state that the plaintiff is the owner of the judgment, and that the same is unsatisfied. We are of opinion that in this respect the complaint is defective. Certainly, the plaintiff could not require an accounting from Mrs. Spieth for funds of the estate embezzled by her, unless the plaintiff were a creditor of the estate. She would be obliged to prove this upon the trial as a material element to support her action. She should, therefore, allege it. The pleading that the plaintiff had once obtained a judgment is not pleading that she still owns it or holds it, and that the same is unpaid. In this respect the demurrer must be sustained.

Another ground of demurrer is that the complaint is ambiguous, uncertain and unintelligible, and the demurrer then goes on to point out in detail wherein the ambiguity, uncertainty and unintelligibility exists. We are satisfied that in some of these respects this portion of the demurrer is also good. In one part of the complaint it is stated that in May, 1888, Spieth & Krug had \$40,000 in property, and owed \$25,000; and in another place it is stated that both parties were insolvent for five years before 1892. In other respects the complaint is very inartistically drawn, and probably uncertain, ambiguous and unintelligible, within the meaning of those words as used in the construction of pleadings. But we shall not go into details as to these defects in the complaint, for the reason that the counsel who now appears for the appellant practically confesses the weakness of the pleading in these respects. If he were the same counsel as the one who drew the complaint, we should feel disposed to show him little, if any, consideration, for the reason that he expressly elected to stand upon the complaint after the demurrer had been sustained, and after these defects had thus been pointed out to him. But the present counsel for the appellant is in a position which is somewhat unusual. The original counsel was Mr. E. P. Cadwell, who, after this appeal was taken, was disbarred from practice in this court for dishonorable and unprofessional conduct. The present counsel, Mr. Hartman, was afterwards substituted. The complaint appears to be one where there is not a statement of a defective cause of action, but a defective statement of what may be a good cause of action. This is an equity action in an equity court. There is very much in the complaint appealing to the conscience of a chancellor, and arousing the belief that plaintiff, if her allegations be true, and be clearly set forth, has good cause to appeal to equity. It would seem to be a harsh ruling to wholly deprive her of equity relief, upon the very threshold of the court, by reason of a defective statement of her cause of action by a counselor whose career has been such as that of him who commenced this action.

Therefore, while we must approve the ruling of the district

court, and sustain the demurrer for the reasons above stated, and while we might, under some other circumstances, finally affirm the judgment, we shall in this instance remand the case to the district court, with directions that if the plaintiff, within 30 days after the filing of the remittitur in the district court, tenders an amended complaint, free from the objections existing as to the present one, the judgment shall be set aside, and the action proceeded with; otherwise the present judgment will be affirmed. (*Ledlie v. Wallen*, 17 Mont. 150.) Her counsel who appeared in court, having stated that he should not have drawn a pleading containing the ambiguities of this complaint, may then have opportunity to prepare a complaint which is free from the objections which he himself concedes exists in this one. Under the circumstances in this case the costs will be paid by the appellant.

Remanded.

HUNT, J., concurs.

STATE, RESPONDENT, v. GAY, APPELLANT.

[Submitted March 9, 1896. Decided March 23, 1896.]

CRIMINAL LAW—Homicide—Evidence.—On a trial for murder, evidence that prior to the killing the defendant had had litigation or trouble about his land, which was offered for the purpose of showing the beginning of the trouble and the sentiment worked up against the defendant, was properly excluded until it might become relevant by connecting the deceased therewith; or until it was shown to relate to some circumstance that extenuated the killing.

SAME—Evidence.—On a trial for murder evidence offered by the defense that some person, not a witness in the case, had burned the defendant's house some days before the homicide, was properly excluded as irrelevant where it did not appear that the deceased had participated in the burning.

SAME—Degrees of offence—Instruction as to penalties.—Where the jury were instructed upon the distinguishing features of the several degrees of murder and manslaughter as defined by the statute, and as to the penalty for murder in the first degree, the omission of the court to also inform the jury as to the penalties for murder in the second degree and manslaughter was not prejudicial to the defendant, where no instruction defining such penalties was requested by the defendant and the jury found him guilty of murder in the first degree. (*State v. Baker*, 13 Mont. 190, cited.)

SAME—Instruction as to dying declarations.—The jury being the sole judges of the weight to be given to the testimony, an instruction offered by the defense that dying declarations should be received with great caution, was properly refused as commenting on

18	51
20	372
20	530
18	51
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23	481
18	51
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the weight to be given to that particular portion of the testimony. (*State v. Gleim*, 17 Mont. 17; *Wastl v. Montana Union Ry. Co.*, 17 Mont. 218, cited.)

SAME—Instructions.—The court not being required by section 2070 of the Penal Code, to give an instruction in any modified form, a party offering an erroneous instruction cannot complain that it was not corrected and then given.

SAME—Dying declarations—Evidence.—Statements by the deceased just after being shot, and while rational, that he knew his wound was fatal; that he could not recover; that he would never see his home again and that the defendant had shot him, are admissible as dying declarations, it appearing that he expressed no belief in his recovery at any time, and that a doctor had told him that all he could do was to alleviate the pain. (*State v. Russell*, 13 Mont. 164, cited.)

SAME—Murder—Evidence to sustain conviction.—Evidence that the defendant had aided another to escape from arrest and had left in his company threatening to kill any one who attempted to arrest him; that prior to the homicide both had resisted the officers on several occasions; that while being pursued his companion killed an officer, whose official character was well known to both, and whom defendant had himself threatened to kill, although the officer after exchanging some shots with him had commanded them to surrender and said he would shoot no more; that defendant shot an other officer immediately upon the latter discovering him in hiding; that the deceased in his dying declaration said that defendant had shot him; that defendant after shooting the deceased shot at another officer; that defendant was at no time fired upon until he had first drawn his gun or was fleeing to elude them,—is sufficient to sustain a conviction of murder in the first degree.

SAME—Arrest—Resistance to officers.—Where one who had committed a felony and had shown a disposition not to submit to arrest aimed a rifle at an officer, whom he well knew officially, and prepared to shoot him when commanded to stop and throw up his hands, it was not necessary to justify the attempted arrest that the officer should have first disclosed his official character and the reason for the arrest.

SAME—Remarks of counsel in argument—Appeal.—The appellate court will not review remarks made by the prosecuting attorney in argument to the jury, and claimed to have been prejudicial to the defendant, where no objections were made at the time and the court was not requested to instruct the jury to disregard them. (*State v. Biggerstaff*, 17 Mont. 510, cited.)

NEW TRIAL—Misconduct of jurors.—Affidavits of jurors are competent to rebut affidavits charging misconduct on their part, made in support of a new trial, and where the misconduct was alleged to consist in the discussion, within the jury room, of an incestuous contract, said to have been made by the defendant, and in separating among spectators in the court-room during recess where the contract and the merits of the case were being discussed, the motion was properly denied where the affidavits of the jurors showed that the contract was not spoken of until after the verdict had been agreed to and which was based solely upon the evidence and instructions, and the bailiffs made affidavit that no one conversed with the jurors during recess. (*Territory v. Burgess*, 8 Mont. 58; *State v. Jackson*, 9 Mont. 508; *State v. Anderson*, 14 Mont. 541, cited.)

SAME—Newly discovered evidence.—A new trial upon the ground of newly discovered evidence, based upon the affidavit of a member of the sheriff's posse that they were instructed to take no chances and to kill the defendant on sight, is properly denied, where the officer by counter affidavit, as well as the sheriff, stated that the instructions were not to shoot unless absolutely necessary.

SAME—Same—Diligence.—A new trial upon the ground of newly discovered evidence is properly denied where the uncontradicted affidavit of the prosecuting attorney completely rebuts the affidavits in support of the motion, by showing that all the newly discovered evidence could have been easily procured on the trial.

CONSTITUTIONAL LAW—Ex post facto law—Changing rules of evidence.—The Code of Civil Procedure of 1895 (§ 3265) making a malicious and guilty intent a conclusive presumption from the deliberate commission of an unlawful act for the purpose of injuring another, is not *ex post facto* as to a homicide committed prior to its adoption, in that it changes the rules of evidence and declares a force to evidence greater than that existing under the former statute (§ 19, Fourth Division of the Compiled Stat-

utes) defining express malice to be "that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof." since express malice is composed of the same elements of fact in each statute, all of which must be proved by competent evidence beyond a reasonable doubt, and each of which is rebuttable.

Appeal from First Judicial District, Lewis and Clarke County.

CONVICTION for murder in the first degree. The defendant was tried before BLAKE, J. Affirmed.

Lewis Penwell, W. F. Sanders and J. M. Clements, for Appellant.

R. R. Purcell, Henri J. Haskell, Attorney General, and Ella K. Haskell, for the state, Respondent.

I. Where a party moves for a new trial on the ground of misconduct on the part of the jury, which took place during the trial, he must aver in his motion, and show affirmatively that he and his counsel were ignorant, until after the jury had retired, of the fact of such misconduct. (Thompson & Merriam on Juries, § 428; *Territory v. Hart*, 7 Mont. 489; *Territory v. Burgess*, 8 Mont. 58; *Territory v. Clayton*, 8 Mont. 18; *State v. Jackson*, 9 Mont. 509; *State v. Floyd*, 63 N. W. (Minn.) 1096; *State v. Anderson*, 14 Mont. 541; *Bradshaw v. Degenhart*, 15 Mont. 267.) The fact that opportunity may have been given for improper communications with a jury while passing in and out of a crowded court room or on the street, does not, in the absence of any showing that such communication was actually had, or that there was any misconduct, raise a presumption against a verdict. (*King v. State*, 20 S. W. (Tenn.) 169.) It affirmatively appears that in none of the separations of the jury complained of did they hold any improper communications with any persons, or overhear any conversation between them which would tend to influence their verdict against the defendant. The separation of the jury, where it is shown that they were not approached, is not ground for a new trial. (*State v. Church* (S. D.), 60 N. W. 143;

State v. Murray, 29 S. W. (Mo.) 700; Thompson & Merriam on Juries, § 439.)

II. Evidence of defendant's threats not to be taken alive and to kill any one who came after him, was competent as explaining why the officers proceeded to make the arrest in the manner in which they did, and as showing that their actions were justified by the defendant's threats. The evidence is also competent to show that defendant expected there would be an attempt made to arrest him, and having made these threats that he would kill any one who attempted to arrest him, he could not claim that he apprehended any unnecessary violence from the officers, because of the precautions they took and of their being armed and prepared to defend themselves, because he must have expected, in view of the threats made by him, that the officers, in attempting to arrest him, would arm themselves and be prepared to defend themselves by shooting, if necessary. (*Miller v. State* (Tex.), 20 S. W. 1103; *People v. Brown*, 59 Cal. 353; *Rudolph v. People*, 45 N. Y. 215; *People v. Carlton*, 115 N. Y. 633; *Rowan v. Sawin*, 5 Cush. 284.)

III. It does not appear from the record that any exception or objection to the statements of the attorneys for the prosecution was made by counsel for defendant during their remarks to the jury. (*State v. Hawkins*, 18 Ore. 480; *Sears v. Seattle Street Ry. Co.*, 6 Wash. 233; *State v. Reagan*, 8 Wash. 511.) An exception to improper remarks of counsel in arguing to the jury will not be considered when no instruction as to how the jury shall consider such remarks is requested. (*Columbia Railroad Co. v. Hawthorn*, 3 Wash. Ter. 354; *Sears v. Seattle Street Ry. Co.*, *supra*; *State v. Biggerstaff*, 17 Mont. 510; *West v. Brown*, 35 Pac. 921; *Farmer v. State*, 91 Ga. 720; *State v. Howard*, 24 S. W. 41; *North Chicago Street Ry. Co. v. Cotton*, 140 Ill. 186; Thompson on Trials, Vol. 1, § 957; *State v. Mack* (La.), 14 So. 141; *Stone v. State*, 17 So. 114; *Territory v. Collins*, 6 Dak. 234; *Learned v. Hall*, 133 Mass. 417; *Miller v. State* (Tex.), 25 S. W. 634; *State v. Sorton* 34 Pac. 1036.)

IV. The contention of counsel that the court erred in instructing the jury as to the punishment for murder in the first degree, and not instructing them as to the punishment for manslaughter is answered by the fact that defendant did not request of the court an instruction as to what the punishment for murder in the second degree is, or as to what the punishment for manslaughter is. (§ 1080, Code of Civil Procedure) It is not error for the court to omit to charge the jury upon a particular point unless asked to do so at the trial. (*Territory v. Rowand*, 8 Mont. 118; *People v. Haun*, 44 Cal. 100; *People v. Ah Wee*, 48 Cal. 239; *People v. Geiger*, 49 Cal. 649; *People v. Gray*, 66 Cal. 276; *People v. Flynn*, 73 Cal. 516; *People v. Oleson*, 80 Cal. 128; *People v. McLean*, 84 Cal. 482; *Territory v. McAndrews*, 3 Mont. 164.) Failure of the court to charge the jury on any given question of law is not error unless a request for the charge was made by counsel. (*State v. Brooks*, 5 S. W. 257 (Mo.); *Powers v. State*, 87 Ind. 144; *Rauck v. State*, 11 N. E. 450; *State v. Paxton* (Mo.), 29 S. W. 705; *Blunt v. Florida*, 11 So. 547; *Felton v. State*, 39 N. E. (Ind.) 228; *People v. Marks*, 13 Pac. (Cal.) 149; *State v. Anderson* (S. Car.), 2 S. E. 699; *Leeper v. State*, 40 N. E. (Ind.) 1113.) Defendant's instruction as to dying declarations was properly refused as it was argumentative in its nature, and not applicable to the facts of this case and instructed the jury on the weight of evidence. (*State v. Sullivan*, 9 Mont. 174; *State v. Gleim*, 17 Mont. 17; *State v. Pearce* (Minn.), 57 N. W. 652; *Wastl v. Montana Union Ry. Co.*, 17 Mont. 213; *Knowles v. Nixon*, 17 Mont. 473.)

V. The appellate court will not grant a new trial on the ground that the verdict is contrary to the evidence if the testimony is conflicting, and there is any evidence to support the verdict. (*People v. Brown*, 27 Cal. 500; *People v. Strange*, 61 Cal. 496; *People v. Darr*, 61 Cal. 554; *People v. Vance*, 21 Cal. 400.)

VI. The circumstances under which Macke was killed clearly show that the defendant is guilty of murder in the first degree. It appears therefrom that defendant and Gross had de-

terminated not to be arrested and that they knew that a posse was after them to arrest them for felony. At the time Macke was shot no effort was being made to take defendant into custody for the reason that the officers did not know where defendant and Gross were. (*People v. Pool*, 27 Cal. 572; *Genglish v. State*, 30 S. W. (Tex.) 233; *Thompson v. State*, 18 S. E. 305; *Wilson v. State*, 141 N. Y. 185; Kerr on Homicides, § 189, 198; 1 Wharton on Criminal Law, § 414-419-434-443.) At the time Macke was shot the question of warrant or no warrant was not considered by defendant and Gross.* They did not know but every member of the posse had a warrant in his pocket. None of the officers or members had an opportunity to exhibit a warrant to defendant Gay for the reason that they shot at the officers whenever they thought an attempt to arrest them was about to be made.

VII. Newly discovered evidence, merely cumulative or impeaching, is no cause for granting a new trial. (*Sweet v. State* (Ga.), 17 S. E. 273; *Penn. Co. v. Nations*, 12 N. E. 309; *Lee v. Berlinham*, 18 Pac. (Kan.) 218.) Affidavit for new trial on ground of newly discovered evidence must contain facts showing diligence. (2 Thompson on Trials, § 277.) Appellant's ability or inability to have obtained it before trial is a question of fact for the court to determine from proof submitted in support of motion. (2 Thompson on Trials, § 2767; *People v. Sutton*, (Cal.), 15 Pac. 86; *Martin v. Price* (Ind.), 40 N. E. 33.) A general statement that all possible diligence was used is not sufficient. (*Peterson v. Collier*, 3 S. E. 119; *Weeks v. State*, 3 S. E. 323.) The defendant must show that the testimony came to his knowledge subsequent to the trial, that it was not due to want of diligence that it was not discovered earlier, and that on new trial would probably produce a different result. (*Wilson v. State* (Tex.), 21 S. W. 361.)

HUNT, J.—The defendant, William Gay, was charged with the crime of murder in the first degree. The information alleges that on the 12th of May, 1893, he deliberately and ma-

liciously killed James Macke, by shooting him with a rifle. The defendant was tried and convicted, and is now under sentence of death. He made a motion for a new trial, which was overruled. He appeals from the judgment of conviction and the sentence of death, and from the order overruling the motion for a new trial.

We will first notice the errors urged on argument, and relied upon in the appellant's brief :

1. The defendant testified in his own behalf. After briefly reciting the fact that he had resided at Castle for some time, defendant said that he had located a lot on some disputed ground at Castle, and built his house. He was then asked this question : "Subsequent to building your home and living there, you may just state generally, without particulars, whether or not you had any litigation or trouble about that land?" The state objected upon the ground of irrelevancy. Defendant's counsel stated that the object of the question was to show the beginning of the trouble, and the sentiment worked up against defendant, resulting in transactions in April and May, 1893. The court then said : "At this time I do not think it competent for this witness to testify upon that subject. So far as I know, the name of this man Benson has not appeared in any way. I remember the opening statement. If it is subsequently shown that this man Benson was behind these proceedings, then the witness may testify on that matter, but at the present time I do not think it would be competent to go into it. The objection is sustained."

We can perceive no error in the ruling of the court. The fact that the defendant had had litigation or trouble about his lot had no possible apparent relation to the killing of James Macke, or the events or facts immediately, or even remotely, connected therewith. The rule is that all facts that go either to sustain or impeach a hypothesis logically pertinent are admissible. "But no fact is relevant which does not make more or less probable such a hypothesis. Relevancy, therefore, involves two distinct inquiries, to be determined by logic, unless otherwise arbitrarily prescribed by jurisprudence : (1) Ought

the hypothesis proposed, if proved, to affect the issue? (2) Does the fact offered in evidence go to sustain this hypothesis?" (Wharton on Criminal Evidence, § 24.)

The offer of counsel did not make the evidence relevant at that time, unless it tended to prove that Macke was directly or indirectly connected with the "trouble," and the "sentiment worked up" against defendant, prior to the time he was killed (some months afterwards), or unless it related to some fact or circumstance that extenuated the killing of Macke. It did not tend to do either. Besides, the ruling of the court was, expressly, not a final one; and, in the reasonable exercise of its discretion in controlling the order of proof, the judge properly excluded the testimony until it might appear to be relevant. No offer was subsequently made to introduce any testimony concerning the suggested litigation or lot difficulty, nor was any testimony offered in any way referring to any particular affair of the kind.

2. One J. H. Kidd testified for defendant to the effect that one night, shortly after Rader was killed, in the early part of May, 1893, he was going towards Gay's house, in Castle, to give an alarm of fire, and at that time saw one George Creiger. The state objected to what Creiger said or did at the time, as immaterial and forming no part of the *res gestae*, said Creiger not being a witness. The defendant insisted that it was competent to show that Creiger burned Gay's house before Macke was killed. The court excluded this offered testimony as to Creiger, giving as a reason that Creiger was not a witness, and that the state had not brought anything he did before the jury. The testimony appeared to be entirely irrelevant to the killing of Macke, or to the conduct of defendant prior thereto. Suppose Creiger had maliciously burned defendant's house; unless it was shown Macke had had some participation in it, what possible explanation or justification could Creiger's offense constitute for the alleged wanton killing of Macke some days thereafter, and many miles away from the scene of the arson by Creiger? The testimony being wholly immaterial, there was no error in sustaining the objection.

3. The court instructed the jury generally upon the several degrees of murder, and their distinguishing features, and manslaughter, as defined by the statutes, and told the jury that under the information, if they were so satisfied under the instructions and by the evidence, beyond a reasonable doubt, the defendant might be convicted of murder in the first degree, murder in the second degree, or manslaughter.

The statute (Penal Code, § 353) fixing death as the penalty for murder in the first degree was given, but so much thereof as fixed the penalty for murder in the second degree was not; nor was the section (§ 356) fixing the punishment of manslaughter included in the charge. The omission of the court to give the penalties for murder in the second degree and manslaughter is assigned as error. The point is not well taken. If the jury had, for example, been instructed what the penalty for manslaughter was, but had not been instructed what the penalty for murder in the first degree was, yet had convicted of murder in the first degree, then the appellant's position would be somewhat different; for it could be argued in such a case that, if the jury had known that death was the penalty of murder in the first degree, they might not have agreed upon that degree of murder, because of the severity of the penalty. But here the proposition is different. The jury in this case, with full knowledge of the worst consequences to the defendant, and with ample definitions of the constituent elements and distinctions of the various degrees of homicide and manslaughter, have found that the evidence warranted the conclusion that the defendant is guilty of that crime which demands the forfeiture of his life to the state. Therefore, if, notwithstanding their knowledge of the severity of the penalty, they have found that the evidence proves that the defendant is guilty of willful, deliberate and premeditated murder, how could a knowledge on the part of the jury that for any other degree of killing, or for manslaughter, a lesser penalty would be inflicted, have benefited the defendant? The answer does not lie in the argument that they really may have found him guilty of murder in the second degree, but, in ignorance,

thought the penalty for murder in the second degree or manslaughter was death, because, in addition to all statutory definitions of homicide generally, they were expressly told that the distinguishing feature between murder in the first degree and murder in the second degree rests in the absence of deliberation, premeditation and preconcerted design to kill in murder of the second degree, while upon manslaughter they were charged that the killing is without malice, and voluntary or involuntary. Again, the statute wisely, and to pin a jury down to the most specific finding in murder cases, requires them to designate in the verdict the degree of murder of which they may convict. Thus, the jury must announce whether they have found from the evidence that deliberation and premeditation indispensable to warrant the conclusion that the crime proved by the evidence is murder in the first degree, beyond a reasonable doubt. With these statutory and other instructions, clearly explaining what murder in its degrees was, what manslaughter was, what excusable and justifiable homicide was; with malice, express and implied, defined; with plain direction that they must designate what degree of murder they found defendant guilty of, if they convicted at all; and with a clear knowledge that murder in the first degree was punishable by death,—they have deliberately applied the law to the evidence, and found the defendant guilty of murder, and have designated that he is guilty of murder in the first degree. By no fair reasoning can we see how the jury could have been misled in their deliberations, or how the defendant could have been prejudiced in his rights, by the omission to tell the jury what the penalties for the lesser crimes were. (*Morton v. State* (Tenn.), 19 S. W. 225.)

Our attention is called to subdivisions 8, 9, § 1080, Code of Civil Procedure, 1895, which read as follows: “(8) When the argument is concluded the court shall charge the jury in writing, giving in connection therewith, such instructions as are offered or allowed. * * * (9) In charging the jury. the court shall give to them all matters of law which it thinks necessary for their information in rendering a verdict.”

No instructions defining the penalties for murder in the second degree, or manslaughter, were asked by the defendant; and as said, the court did give the jury the law of murder and manslaughter as defined by the statutes, and necessary for their information. The rule laid down in the case of *State v. Baker*, 13 Mont. 160, was therefore complied with, and the defendant cannot complain. Most of the cases cited to us by the appellant upon this point are where the court omitted entirely to charge upon the crimes of murder in the second degree and manslaughter, or to define the elements of such crimes at all. They are therefore not applicable.

4. Error is assigned because the court refused to give the following instruction offered by the defendant: "The jury are instructed that the dying declarations of Macke are to be received with great caution, for the reason that the accused has not the power of cross-examination,—the power quite as essential to the eliciting of all truth as the obligation of an oath can be,—and that where the witness has not a deep and strong sense of accountability to his Maker, and an enlightened conscience, the passion of anger and feelings of revenge may, as they have not unfrequently been found to do, affect the truth and accuracy of his statements; especially as, too, the salutary and restraining fear of punishment for perjury is, in such cases, withdrawn. And it is further to be considered that the particulars of the violence of which the deceased has spoken were, in general, likely to have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed, and leading both to mistakes as to the identity of persons, and to the omissions of facts essentially important to the completeness and truth of the narrative."

The instruction offered is taken from 1 Greenleaf on Evidence, § 162.

The court refused to so charge, "but offered to embody in an instruction the whole of said section 162." This offer was declined. We have no statute authorizing such an instruction as offered upon the weight to be attached to dying declarations. It would have been error to have simply told the jury

that such declarations were to be received with *great* caution, etc., as asked. "The jury being the sole judges of the weight to be given to the testimony, the court should not tell them what particular weight to give to any portion thereof. (*State v. Gleim*, 17 Mont. 17; *Wastl v. Montana Union Ry. Co.*, 17 Mont. 213.)

Moreover, the instruction did not correctly, argumentatively state the law generally, or as laid down by the author from whose text it was copied. Greenleaf expressly writes as follows in the identical paragraph from which defendant chose the instruction: "Though these declarations, when deliberately made, under a solemn and religious sense of impending dissolution, and concerning circumstances in respect of which the deceased was not likely to have been mistaken, are entitled to *great* weight, if precisely identified, yet it is always to be recollected that the accused has not the power of cross-examination," etc. (as offered by the defendant). The appellant says, however, that if the instruction, as offered, was not in conformity with the judge's view of the law, he should have so modified it as to cover the subject of dying declarations, so as to advise the jury that such evidence was not to be received with the same weight as other testimony.

The statute authorized the court to positively refuse the instruction, and did not make it obligatory to give it in any modified form. (Penal Code, § 2070.) A party may not offer an erroneous instruction upon the weight of testimony, and then complain that it was refused, or not corrected and then given.

5. It is also contended that the dying statements of Macke were inadmissible. Just after he was shot, Macke said he was "shot through the guts." "I wish it was through the heart. Then it would be quicker. It would kill me." When he was offered water to relieve his great suffering, and told that his wound would not be fatal, he said he knew better; that it would be; that he couldn't recover. Later, Macke said "Bill Gay" shot him. He also said to McGrail, when told that he would be taken to Castle when he got better, that he would

never see the springs or home again; and thereafter on the day of his death, he again said Gay had shot him. At all these times Macke was rational. The doctor had previously told him that all he could do for him was to try and alleviate his pain, which was intense from the time of the shooting up to death.

The witness for the state further said that nothing said seemed to encourage him; that when he was put into a wagon, to be taken to a house, some one asked him if he wanted his gun, to which he replied, "I will have no more use for it;" and that he made no expressions of a belief in his recovery at any time, and spoke and acted as if aware of his danger.

We need no authority for the admissions of statements made under such circumstances besides that of *State v. Russell*, 13 Mont. 164, where the law is reviewed and thus commented upon: "These authorities all hold that if all the facts and circumstances surrounding the declarant at the time of making the declarations show them to have been made under the sense of impending death, notwithstanding the declarant may not have said he was without hope of recovery, or was dying or going to die, then such declarations are admissible in evidence. The facts and circumstances surrounding the declarant in this case at the time of the making of the declaration warrant the conclusion that they were made under a sense of impending death, and, we think, were properly admitted to the jury."

6. Coming now to the proposition, earnestly asserted by the defendant's counsel, that the verdict is contrary to the evidence, and to the contention that the conduct of the officers and other members of the posse was illegal, and that the acts of Gay and Gross, even if they did kill Macke, did not constitute murder, we must briefly state the more material parts of the evidence:

It appears by the testimony offered in behalf of the state that in 1893 the defendant, Gay, and one Harry Gross, a brother-in-law and an associate of the defendant, were living in and about Castle, Meagher county. Gay was a married man, and lived with his family in the town of Castle. Gross

lived upon a ranch generally called the "Gross Ranch," about six miles below Castle.

About April 1st, a search warrant was put into the hands of an officer to search Mrs. Gross' house. On April 2d, Gay asked the constable when he was going to send a gun back to Mrs. Gross. The gun belonged to Mrs. Gross, and the constable promised to return it. Gay told the officer that if he, the officer, did not return the gun it would be bad for him.

On the 4th of April a warrant was sworn out against Gross for having resisted an officer while serving a search warrant. Gross was arrested, and taken before the justice, and bound over under the charge of having resisted Westbrook, a constable, in serving a search warrant issued out of the justice's court for Castle township. Gross wanted bail, and the undersheriff, Lewis, went with him while he endeavored to procure such bail. They met the defendant, Gay, that day. Gay was trying to get bail for Gross. That night the officer and his prisoner, Gross, went to Gay's house, to see if Gay had succeeded in his efforts. Gay had not procured bail, and said he would go down to Brockett's ranch, some miles away from Castle, and try and procure bail there. After stating that his horse was ready, Gay went out as if to go to the stable. Gross followed him, and the officer found the two outside of the house talking together. Ten or fifteen minutes thereafter, Gross went out through the kitchen. The officer followed him almost immediately, but he had escaped.

On the 24th of April, Peter Westbrook, a constable of Castle township, went to Gay's house in Castle, to arrest Gay, by the instructions of the sheriff, for stealing a lot of goods in Wyoming. It was about 9 o'clock in the evening when the constable went there with a man named Greiger. He heard a noise upstairs in Gay's house, and started to go up, but was told by the women that he could not go through the house. He did go up, but found no one there. Greiger and the constable, believing Gay had gone out the rear of the house from an upstairs door, then left Gay's house, and went in search of him through some timber near by, when

suddenly Gay rose up from behind a stump 35 or 45 feet distant, and fired at them, and then ordered them to get out, or he would kill them, and fired again.

In the latter part of April,—about the 28th,—Lewis, the undersheriff of Meagher county, the officer who had arrested Gross, and from whom Gross had escaped, in company with a man named Sarter, who was a constable, and one Dennis McGrail, a special deputy sheriff, went down to Gross' ranch, to arrest Gross and Gay. When a mile away from the ranch they saw them apparently working about a hay wagon that was stuck in the mud. The posse kept out of sight of the men as best they could, and hid themselves about 150 yards back of Gross' house. The evidence tends to prove that the officers were seen, however. Gross and Gay finally extricated the hay wagon, drove to the barn, unloaded the hay, changed their wagon bed, and started down the creek. When they passed a point about 200 yards away from the posse in hiding, Lewis and one of his posse rose up, and hollowed to them to stop, and to throw up their hands. The team was stopped by Gross, who was driving, whereupon Gay picked up a rifle in the wagon, jumped out of the wagon, ran around to the further side, rested the gun on the wheel, and pointed it directly at the posse. Upon seeing this, Lewis raised his gun and shot. Gay fired within an instant thereafter. Gay fired again. Then the team ran away. The officers returned the shots. Gay then moved to the other side of the creek, and again fired, but nobody was hit. The posse returned without further effort to arrest the men that day.

At the time that this posse went down to Gross' ranch, the object of arresting Gay was for helping Gross to escape from the officer, and the reason given by the undersheriff for taking the two men with him was that he had been told that Gay and Gross had said they would never be taken alive; that they would kill any one that came after them. At that time McGrail who was sworn in as a deputy sheriff, had a warrant for the arrest of both Gay and Gross for stealing some goods in Wyoming and bringing them into Meagher county. It had

been placed in his hands on April 26th, by the undersheriff, Lewis.

On the 8th of May, C. E. Westbrook saw Gay and Gross some six or seven miles south of Castle. They were on horseback, and at first moved away from Westbrook, but he subsequently met them two miles further away, at the Durst ranch. Each had a rifle; Gay's being a 45-120 Sharp's rifle, known as a "buffalo gun." Gay asked Westbrook if he was looking for them, and upon being told, "No, not particularly," he replied, "Well, you don't want to be, nor any other ——." Westbrook told Gay that he was not looking for them. To this Gay said that there were a lot of parties looking for them, and he thought the witness was one of them. The three men talked for over an hour, and in this conversation Gay said that he understood that Bill Rader was out after him. Westbrook assured him that Rader was not, because he and Rader had been on a jury at White Sulphur Springs just before. To this Gay said that he was not afraid of Bill Rader any more than he was of any one else, but that, if he came out there after him, he would hurt him, or would kill him. Continuing, Gay said: "I always looked upon him [Rader] as a friend of mine, and I don't want him to come monkeying with my business. * * * I want you to tell him where you seen me. Tell them, if they want me, to come here after me." Gay also said that they had been trying to arrest him, and he had not done anything to be arrested for; and that, if they came out there, and wanted to arrest them, he would kill them,—any one that came. On cross-examination, this witness said that Gay stated that people had been hounding him, and that he had not stolen anything from anybody in Castle, or done any one there an injury, and that he would defend himself, and would not be arrested, and that there were not men enough in Meagher county that had sand enough to arrest him. Upon the day of this conversation with Gay, Westbrook told Fred Lewis, the undersheriff, in detail, what he had seen and heard.

On the 8th of May a posse started to arrest Gay and Gross.

When they were near Gross' ranch, they saw two men riding away on horseback, apparently armed. The posse, which consisted of seven men, then divided. Lewis, Rader, Brown and Westbrook went around to head the men off. The others were to keep behind them, and thus the men would be surrounded. The four who were together in turn separated again, Rader and Westbrook going together. They ran on to Gay and Gross after riding five or six miles. They came up a little ridge, leading their horses, and saw Gay and Gross below them, near a pile of poles,—one at the end of the pile, and the other ten feet away. The officers hollowed to them to surrender, and throw up their hands. At that time they were about 160 steps from Gay and Gross, with no obstructions between them. Gay was ten or twelve feet from the poles, walking over to the pile, and looking at the officers. The officers again hollowed. Gross then prepared to shoot, and the officers shot. Gay fell, as if shot, behind the pile of poles. Three or four more shots were exchanged. Rader then walked down the ridge, and hollowed out loud to them, saying: "Gross, you and Bill Gay come out and surrender. We have quit shooting. Come out and surrender to us, and we won't fire any more at all." No answer came from Gay or Gross. Rader then changed his position, so as to get the men between himself and Westbrook. To do this he went on top of the ridge considerably higher than he had been. He went slowly, and not directly, and took about 20 minutes to reach the top, which was about 500 yards off. No shots were being fired at that time. When Rader reached the top, Westbrook saw a man, whom he recognized to be Gross, step out from behind some trees about 50 feet away from and back of Rader, and shoot. Rader threw his gun out of his hands, and hollowed that he was shot. Immediately thereafter the man from the pile of poles below fired at Westbrook. When Rader was shot, Westbrook had Rader's horse, his own having broken loose from him. Westbrook then went to inform the rest of the posse of the fight, leaving his own horse, and riding Rader's. The posse returned to the point where Rader was killed. They

were on horseback, and were riding up to a high point on the ridge, when they saw a dog lying by the trees and a man behind the trees. An effort was made to surround the two men, but when they got to the top of the hill, having gone by an indirect way, they saw them jump on their horses and ride away, having an extra horse with them, the extra horse being the same animal that Westbrook had lost some hours before, at the time when Rader was killed. The posse then gave up the search at that time.

In the next day or so the sheriff and a posse of seven started towards the Musselshell river, believing that Gay and Gross had gone down there. They left Castle about two days after Rader had been killed; that is, on May 11th. On the morning of the 12th of May they reached the Musselshell, where the sheriff increased the number of his posse by summoning several men in addition to those he took with him. They made a rendezvous at a place called "Winnecook," some 65 miles from where Rader had been killed. About that place they divided. Four or five went across the Musselshell river. Three men went down the river; the rest of the posse stayed with the horses. There was a wire fence at the foot of a bluff, inside of which there was meadow land. Brush and willows grew along the river. A shepherd dog was tied in the brush and trees near the Musselshell river, to the right of the bend, some little distance away. A man named Williams, who had been summoned by the sheriff at Martinsdale, and who was with the posse, had seen a man with three horses near a wire fence below a cut bank in the field on the Musselshell. After making this discovery, he informed the sheriff and his posse. The horses were identified as the three that Gay and Gross had had. Thereafter Lewis, Macke and Williams, who joined them, started across the meadow, and were going up the river next to the edge of the growths of willows that there were on the east side of the Musselshell. They were going towards the bend. Their orders from the sheriff were distinctly not to shoot unless necessary to defend themselves. Lewis was in the lead. Twenty-five feet behind him was Williams, and 25

feet behind him was Macke. Macke was looking at Williams, each man holding his gun with both hands, but not looking for anybody in the brush. These three had proceeded this way to a point in the brush about 150 yards from the bend of the river, when they heard something. Williams looked back towards Macke, saw him "kinder wheel down, heard a report of a gun, and saw smoke right above the brush." The firing came out of the brush opposite Macke, and about 20 feet from him. Lewis says that he did not hear any shots fired in that vicinity before that time that day. Williams, who never had seen Gay to know him, saw a man under a clump of willows, with a gun in his hands, lying on his stomach, and resting on his elbows, with the gun pointed right at where Macke stood.

Williams' description of the face of the man who pointed the gun in the direction where Macke fell disagrees entirely with the description of the man Gross. Gross is described as a tall man with light hair, light complexion and gray eyes. The man that Williams saw had a dark beard and very sharp eyes; such eyes as Gay's. Williams snapped his gun at him, but the weapon being out of order, did not go off. The man who had shot Macke then got on his knees, loaded his gun, and aimed towards Williams, and fired, and Lewis then fired. Williams and Lewis moved away. Thereafter Lewis fired in the direction whence the shot had come that killed Macke. Macke was moved out some little distance from where he was shot.

Macke was shot near the center of the body, the ball entering about an inch above and two inches to the left of the navel, and ranging down and coming out above the hip bone close to the spine. He suffered intensely, and died two days thereafter, after repeatedly saying that the defendant Gay had shot him. Later that day some shots were fired in the brush where the men were secreted, but to no avail. They did not come out. The attempt to arrest was again given up. The day after Macke was shot, the posse went down to the scene of the killing. The dog and men had gone. They found a pit, freshly dug in the sand among the willows and very close to

where the man was lying when he shot Macke. It was probably four or five feet one way, running north and then to the west and then to the south. In the middle there was a place about two feet wide, in the shape of a barricade. Between the pit and the creek to the west there were thick willows. On the east side it was open mostly, except the tops of the willows. Two knives were found there.

A search was thereafter made by the sheriff for Gay and Gross, but they had gone. Gay was afterwards arrested, in December, 1894, at The Needles in California

Macke in his statement always said that Gay shot him, and on one occasion he told the doctor that when he received the shot he was in a leaning position, and that he looked around, and saw Gay, and then turned around, facing Gay, and in a stooping position, looking, and when he was in that stooping position he received the shot.

The defendant himself testified that he had, while living in Castle in 1892, received various letters warning him to leave that vicinity or he would be killed. He denied that he ever told the constable that unless Mrs. Gross' six-shooter was returned to her trouble would come to the constable. He denied that he had ever aided Gross to escape, but said that the arrangement between Gross and himself at that time was that he (Gay) should go to arrange and try to procure bail for Gross, and that there was no concert of action between him and Gross in Gross' eluding the officers; that upon the night of the 24th of April he saw two men about his house, one of whom stepped behind a pine bush; that he heard a man at the front of his door say that he had come to arrest Gay, and was going to have him or kill everybody in the house; that immediately thereafter he stepped out of his house taking a Sharp's rifle with him; that when he got about 75 feet from the house he saw some one behind a big stump, and that that person fired at him; that immediately thereafter men followed him; and that he hid behind a stump himself; and very soon after he went up a ridge near his house, crossed over it and went down by a ranch, and over to Gross' ranch; that on the 27th of April, when the

shooting occurred on Gross' ranch, while he and Gross were driving down the creek after unloading a hay wagon and when they had passed Gross' house, about 300 yards, and without knowing that anybody was in the vicinity of the house, about 250 or 300 yards from the house, they stopped; he heard a shot on his left, and several more shots were fired immediately; that he then jumped out of the wagon, grasped the gun, and started towards the creek, about 75 yards distant; that he saw two men bareheaded in the sage brush, with their guns pointed at them and shooting; that one bullet went through the wagon box; that he did not recognize any of the men; that he did not rest his gun on the hind wheel of the wagon; that while he and Gross were running away, and about that time, several shots were fired; that he then crossed over the creek, and went onto a bench on the other side, and that very soon thereafter he and Gross saddled their horses, and went out to the hills and remained over night, because they were afraid of their lives. The defendant said he never heard any command to throw up his hands.

The description of the fight where Rader was killed as given by the defendant was that he and Gross were going over to Brocket's ranch to return a gun Gross had borrowed; that he was taken sick on the way, and sat down near some poles or logs on Woodson creek; that they were not traveling in a public highway, but were making a straight line across the prairie, regardless of the roads, without suspecting that any one was following; that he laid down near the logs, and went to sleep; that he had been sleeping probably an hour, when Gross hollowed that some men were after them; that at that time two shots were fired; he grasped his gun, and then saw two men on the ridge; that he heard nobody say anything, and that he and Gross ran to the creek; that in the excitement he went back to the pile of poles for his belt of cartridges, and as he turned around was shot in the knee, whereupon some one hollowed: "I have got you, you s— o— b—;" that the shot came from where the men were; that he did not recognize either of the men; that he and Gross then made towards the point of the

ridge that came down to the creek, Gross in the lead; that they saw the two men making a detour to get around the ridge, and that when they arrived at the point where the ridge projects into the creek, two men were coming down the ridge. He further said that he could see Gross ahead of him on the side of the hill, and that about the time he, the defendant, got opposite the ridge, two shots were fired; that he looked around, and saw two men about 150 yards from the creek where he stood; that Gross fired one of the shots, and the other was fired by one of the two men; that one of the men dropped his gun and ran, and the other man followed and hollowed and both ran up the ridge; that he did no shooting himself at that time and no more was done; that he and Gross followed up the ridge and found two guns near where they had seen the man drop his gun; that Gross took one gun, and that defendant and Gross were walking, leading their horses, down the hill, when five men appeared; that one of the mounted men fired at him, whereupon defendant and Gross started for the Freeman ranch on the Bozeman fork of the Musselshell.

The defendant says that he had an interview with Ed Westbrook about the 8th of May, in which interview he told Westbrook that he was tired of being shot at every time a posse was out after him, and that he asked Westbrook if he had heard that Rader was out after him. Westbrook replied by saying, "No," whereupon defendant said: "Well, Mr. Rader and me has always been good friends, which was true, and you tell Mr. Rader, that if he wants me, and brings a warrant, and comes out to me like a man, and will guarantee me protection, I will go with him. I have got tired of being shot at every time anybody comes around in sight of me;" that he told Westbrook that he had not done anything to be arrested for; that he had been threatened; but that he did not tell Westbrook that if he saw Rader, or any one else, he would not be arrested or taken alive.

The defendant said that when they got down onto the Musselshell, having traveled by night, they went into a man's field, picketed their horses, and slept; that when they woke up

they saw a man up the creek on horseback; that at that time they had three horses, having found one on the flat after the shooting on Woodson creek; that they had a black dog with them; and, after traveling a little distance, they stopped on the right hand side of the road, under a high bluff, and tied their horses to a wire fence; that thereafter they went on the ridge to look out over their back trails, and saw what appeared to be a band of mounted men; that they at once went down to where their horses were, and that he and Gross got two butcher knives, and started down to the creek, crossing the creek twice; that they saw a man ride up to a man with some sheep and saw the man point towards where he and Gross were; that they followed down the creek in the thickest of the brush; that before they crossed the creek the second time he tied the dog; that they immediately commenced digging a rifle pit with the butcher knives, and while they were digging they heard some 20 shots fired towards where their horses were tied; that while they were in the pit, and had been there about an hour and a half, they saw a man come along on the side next to the prairie; that the defendant's position was next to the creek, and Gross was watching towards the prairie, their feet being together as they sat face to face in the pit. Defendant did not recognize the man, but Gross told him it was Undersheriff Lewis; that Gross was going to shoot him, but defendant begged him not to; that immediately Lewis started and ran; that thereafter he (defendant) was digging in the pit, and three or four minutes afterwards Gross jumped on his feet and fired; that he, defendant, saw the man fall; that at the time of the firing Gross had jumped out of the pit, but jumped back again; that several shots were then fired; that he saw several men pass up and down on the prairie thereafter, but could not tell who they were; that he did not see who the man was that Gross had shot at; that he did not see Williams on that occasion; that after the man was shot Gross raised his gun, and stuck it through the willows and fired; that about an hour afterwards there was a terrible fusilade up the creek, about 200 shots being fired, some of them being close to de-

fendant; that shots were fired off and on for half an hour before Gross had fired, and that the bullets whistled above the willows. On that night, the defendant said they moved away traveling by night until they reached Castle.

On cross-examination the defendant testified substantially as he did on the direct examination, but said that on the night that Westbrook went to his house in Castle he knew that Westbrook was an officer,—a constable; that he generally carried a gun, owing to the threatening letters he had received, although it had been his custom all his life to carry a gun with him on the prairie; that on the day of the shooting at Gross' ranch he had his gun with h'm, thinking, possibly, he might run across some game; that he knew the individuals who made up the posse, but did not know the man that fired at them that day; that he knew Rader well; that Rader was his friend; that he did not know the men he saw were after him; that he did not have time to converse with Rader; that he did not know the man who was shot was Rader; that they got the third horse where Rader was killed, finding him loose, with a saddle on; that when they went to the brush on the Musselshell before the fight they had gone three or four or five hundred yards from their horses; that they did not want the dog along with them, as the posse could see where they were that much quicker; that the pit was not completed when Macke was shot; that when the shot was fired he looked around, and saw the second man, but before that he had been busy digging; that he knew James Macke well, had known him for 12 or 15 years, and that he was within 20 feet of him when he was shot, but did not know who he was because he was falling when defendant looked around; that after Macke was shot he asked Gross not to shoot again unless he was forced to do it; that Gross' hair and complexion were lighter in color than his; that he had not sought the protection of the officers at White Sulphur Springs, when he was ordered to leave Castle, because White Sulphur Springs was quite a long ways—35 miles—from Castle, and everybody knew about his being threatened, and no one seemed to give him any protection. The rebuttal

testimony tended to prove an admission by Gay that upon the day of the fight at Gross' ranch they expected officers to be after them. A witness also swore that Gay and Gross told him when they were at the pit two men went along before Macke was shot and they saw them.

This evidence went to the jury to be weighed by them under the charge of the court in its various relations to the homicide. If they believed the dying statements of Macke, Gay shot him beyond all doubt, and shot him the instant that Macke turned and happened to see him in or by the pit in the brush. Accepting this fact as proven to the satisfaction of the jury, that Gay meant to kill him needs no demonstration beyond the fact that he was but 20 or 30 feet distant, and shot him in the body. That he was then bent on murder is evidenced by his lying in concealment within the brush, and killing the very first man who chanced to detect him and his hiding place. Again, his antecedent preparations, words, and conduct all prove that he had malice in his heart, and intended to kill any person whose errand was to take him into custody, and who advanced to do that errand. The shooting at the constable at Castle is one act to prove this. The escape of Gross, and the subsequent refusal of the two to yield to the officers' commands to throw up their hands, goes to prove it. The circumstance that they stopped their wagon, and that Gay simultaneously grabbed his rifle, and retired to the further side of the wagon, shows that they not only heard the command, but knew whence it came. The continued shooting at Lewis, whom Gay knew, and whose official capacity he knew, was further proof. So, too, was the firing at Rader, whom Gay had particularly threatened to kill if he came after him. So, too, was the act of hiding behind the poles, on Woodson creek, and the refusal to surrender to Rader when he advanced and ordered them to give themselves up. But more convincing than all other facts leading up to the time when Macke was killed were those of standing by and abetting the killing of Rader, the firing at the officers thereafter, and the flight to the Musselshell river. Having sent word to Rader that he would kill him, personally knowing

Rader well, and having refused to surrender after Rader had announced that he would shoot no more, the defendant's conduct and subsequent overt acts in the execution of the threats are solemn contradictions of the argument of appellant's counsel that there is nothing in the record but the passion or fear of the officers to excuse any one of them from taking a warrant of the state and "walking unarmed into the presence of Gay and Gross, stating to them the writ they had, the errand on which they had come, and the demand that they accompany them to the magistrate; nor is there anything in all this proof to render it probable that Gay would not have cheerfully submitted to an arrest so announced and conducted."

The officers had good reason to be very careful. The loss of two lives was a justification of their belief that the prior threats of Gay to kill those in pursuit of him were deliberate and were to be acted upon. And, throughout the whole evidence of the state, nowhere does it appear that Gay was fired upon until he first drew his gun and aimed towards the officials trying to arrest him, or was fleeing from them to elude arrest. , On the contrary, the evidence is that he maliciously and persistently shot at nearly every man, if not every one, whom he knew or had reason to believe was in pursuit of him, *and whom he knew saw him*. The manner in which Macke was killed proves this. Macke was evidently the first one of the three who went by the pit on the day of the homicide on the Musselshell who saw Gay, and whom Gay knew saw him. Williams was the next man whose eyes met Gay's. He too was shot at but escaped unhurt.

But it is said the several attempts to arrest Gay were illegal, or if legal, were in an unlawfully threatening manner. Upon this subject the court charged, under the statutes, as follows :

"An arrest may be made in the following manner : (1) By a peace officer under a warrant; (2) by a peace officer without a warrant; (3) by a private person. When an officer arrests a person, in pursuance of a warrant directed to him, he shall state by what authority he makes the arrest; and, if requested

by the person arrested, shall show his warrant. An officer having authority to make arrests, shall arrest a person without a warrant: (1) When a person is attempting or has committed a public offense; (2) when a felony in fact has been committed, and he has reasonable grounds for believing the person arrested has committed the same; (3) where he has reasonable grounds to believe that a person has committed an offense, and that he may escape before he can be arrested by a warrant issued by some proper officer. * * *

“An officer acting without a warrant must first state his official character, and the reason for making the arrest, unless the person about to be arrested is in the actual commission of the offense, or when he is pursued, after an escape or flight. A private person, before making an arrest, shall state to the person about to be arrested the cause thereof, and require him to submit, except when such person is in actual commission of the offense, at the time thereof, or is in actual flight thereafter. If, after notice of intention to arrest a person by an officer, said person flee or forcibly resist, the officer may use all necessary means to effect the arrest.

“Every person required by an officer shall aid him in making an arrest. When the sheriff or other public officer authorized to execute process shall find or have reason to believe that resistance will be made to the execution of his process, he may command as many male inhabitants of his county as he may think proper to assist him in overcoming the resistance, and, if necessary, in seizing, arresting and confining those resisting.”

When Gay and Gross were upon Gross' ranch, and the first posse of three went down there, there was no opportunity to read a warrant. Prior events had shown the disposition of the defendant not to submit, and, unless the two were caught without weapons, a fight was most probable. Nevertheless, to give them the opportunity to submit, and to avoid force, the officers ordered them to throw up their hands. Resistance with a rifle at once ensued. At that time no warrant was necessary. Gross had escaped, and there were reasonable

grounds to believe that Gay had aided Gross to resist, and to escape from the authorities at Castle, and in doing so had committed a felony. This was enough, although it appears that McGrail, one of the posse, a deputy sheriff, had a warrant for the arrest of Gay and Gross for bringing stolen goods from Wyoming into Montana in his possession at the time of the shooting on Gross' ranch. The right to arrest them both was therefore complete, under the warrant, by stating by what authority the officers acted; or it was complete, without the warrant, by the officials first stating their official characters, and the reason for making the arrest, unless the men were being pursued after an escape and flight. But where, as in this case, an officer is officially well known to those whom he seeks to arrest, as was Lewis, undersheriff, and where, instead of submitting to a command by such officer to stop and hold up their hands, defendants at once aim a rifle at the officer, and deliberately prepare to shoot at him and his posse within easy recognition distance, their actions are equivalent to an intentional resistance of lawful authority, and the ceremony of disclosing the official characters of the officers and the reason for the arrest is voluntarily dispensed with by the defendants, and cannot reasonably be carried out; but the attempted arrest is by no means illegal. (*People v. Carlton*, 115 N. Y. 623, 22 N. E. 257; *State v. Spaulding*, 34 Minn. 361, 25 N. W. 793.)

This case is readily distinguished from *Starr v. United States*, 153 U. S. 614, 14 Sup. Ct. 919. There it was held that, if the defendant had no knowledge, was not informed, and was not chargeable with notice of the marshal's mission or official character, the fact that the defendant prevented the giving of notice had no such relation to defendant's claim of self defense and justification, founded on his ignorance and the appearance of the facts to him, as to justify the circuit court's charge. The charge was, in part, that if defendant had no notice of the marshal's official character, and the killing was apparently necessary to save his own life, then the killing was in self defense; but, if the defendant prevented the officer from giving

notice of his character or mission by threatening or violent conduct, then, of course, he would not be required to give notice. The facts of that case showed that, although the defendant was armed, he made no attempt to use his gun, and had it down, while the marshal deliberately put his to his shoulder and fired at defendant, and was thereafter killed.

The circumstances of the case at bar tend to show no legal justification for the defendant's acts, even upon the hypothesis that the officers were reprehensible for resorting to a needless command to the defendant and Gross to stop and throw up their hands. (*People v. Pool*, 27 Cal. 573; *Kerr on Homicides*, § 98.)

From the time of the attempt to arrest Gay and Gross at the Gross ranch, the defendants' attitude was that of men who had committed a felony and were escaping and fleeing. Both of them could have been arrested by law without any warrant at all, by an officer, or by a member of a posse acting under an officer's directions and authority. At the time that Macke was killed, the defendant, Gay, was liable for arrest for aiding Gross to escape, for shooting at the officers at Castle, for resisting arrest at Gross' ranch, for resisting arrest by Rader, for aiding and abetting the killing of Rader, for the stealing of Westbrook's horse, and for resisting the officer who pursued him after Rader was killed.

The evidence also tends to show that Gay knew that Lewis, the undersheriff, had gone by, just before Macke was killed. Gay, therefore, must have known that Lewis, as an officer, was looking for him and Gross. He must have known too, that Macke was one of the posse looking for him, for Macke was with Lewis. But, whether he knew that Macke was an officer or not, he had no lawful right to deliberately kill him, unless in necessary self defense. The theory of self defense was fully submitted by the instructions, and was argued to the jury; but it was rejected, and the evidence of premeditated murder credited.

We believe the verdict is in accordance with the evidence, and that it is just under the law.

8. Appellant asks us to decide that the remarks of County Attorney Gormley in the closing argument were prejudicial to his rights. The remarks were directed principally to some accusation once made against defendant of incest with his daughter, the county attorney saying that that matter had first been laid before the jury by defendant's counsel in his opening statement, and the state would have met the issue if it had been made. No objection was made to the remarks at the time of the argument, no request was made of the court to correct the county attorney, and no request was made to charge the jury to disregard the language used. The matter is therefore not before us. (*State v. Biggerstaff*, 17 Mont. 510.)

9. A new trial is asked on the ground of misconduct of the jury and newly discovered evidence. The principal affidavit to support the first of these grounds of motion was made by Benjamin Webster and is to the effect that Child, one of the jurors, said he had heard of an alleged contract in existence, "about Gay living in a state of incest with his daughter," and had heard of it before the trial.

By counter affidavit Child swears that his conversation with Webster was several days after the verdict was rendered; that he never saw any such contract as was referred to in Webster's affidavit, and never said he knew all or anything about the same; that his verdict was based entirely upon the evidence adduced on the trial.

Lewis Penwell, Esq., one of the defendant's attorneys, filed his affidavit to the effect that Dorrance, a juror, told him that, in the jury room, it was said Gay had been the father of a child by his daughter, and that he (Dorrance) was told by a juror that a contract of incest between Gay and his daughter was made between themselves; that Sass, another juror, had said such alleged contract was spoken of in the jury room. Penwell also swears that the jury, during brief recesses of the court, separated and scattered throughout the court room at times when the said contract and merits of the case were being freely discussed by spectators.

Dorrance, the juror, filed an affidavit that a juror told him

Gay's daughter had died from an abortion performed in order to deliver her of a child of which defendant was the father, and that a juror told him of the existence of such incestuous contract; but by later affidavit Dorrance stated that he believed, and is quite positive, that, if there was any conversation about the alleged contract of incest, it was after final vote had been taken on the guilt or innocence of the defendant, and that nothing was ever said or done in the jury room which in any manner influenced his decision, except the evidence.

The three bailiffs swear that, upon adjournment of court, at noon and upon each evening, the court admonished the jury as the statute requires, and that, in the five-minute recesses, they were always present, but no one ever spoke to any of the jurors about the case, nor did any of the jurors talk to anyone about it.

Sass, Henry, Hayes, Schotte, Thompson, McCrum, Evans, and Child, jurors, swear that, during the trial and deliberation, they never heard or talked of anything pertaining to the case except the evidence produced on the trial, and their verdict was rendered solely upon the evidence and a consideration of the instructions. James and Dorrance, jurors, file affidavits to the same effect. One juror, Hickey, corroborates the affidavits of the other jurors, Henry and others, but says he heard a bystander once say, during the trial, that, "if the jury finds that man guilty, they ought to be —" but he did not hear the rest; that, once again, he heard a remark to the effect that the defendant could not be convicted of any greater crime than manslaughter. The affidavits of these jurors are competent. They rebut the affidavits of the defendant; and, the facts being as much within the knowledge of the jurors as of those who made the affidavits of misconduct, they were entitled to equal respect. We find no error in the ruling of the lower court upon this point. (*Territory v. Burgess*, 8 Mont. 58; *State v. Jackson*, 9 Mont. 508; *State v. Anderson*, 14 Mont. 541.)

The affidavits of newly discovered evidence pertained, principally, to an alleged statement, made by Macke, after he was shot, that he was feeling easy, and that, if he recovered, he

would never again meddle with other people's business; also, to the instructions of the sheriff to the posse on the Mussel-shell to the effect that the posse, of which Macke was one, were to take no chances at all in arresting Gay and Gross, but were to kill them on sight, that it was useless to try and take them alive, and "that it was generally understood, between the deputies and the sheriff, that Gay and Gross would not be arrested, but would be killed as a result of the hunt;" also, to a statement by Gay, prior to the killing of Rader, that he would submit to arrest under a warrant, but would not be arrested by a mob without a warrant; also, that the alleged incestuous contract was a forgery.

By counter affidavits the sheriff denies positively that he ever told any person to shoot Gay or Gross on sight, but ordered all members of the posse not to shoot them if they could be taken without shooting, nor unless it was absolutely necessary in order to arrest them. A member of the posse, who had made affidavit used by defendant to the effect that the posse were not to take any chances, by counter affidavit explains his first statement, and expressly says that they were instructed not to shoot unless absolutely necessary. The defendant made no affidavit himself, nor did Mr. Waterman, one of his counsel.

The uncontradicted affidavit of A. C. Gormley, county attorney of Meagher county, completely rebuts the claim of reasonable diligence to produce all this testimony on the trial. He swears that one of the witnesses to newly discovered evidence, Cook, who was in the posse to arrest Gay and Gross, was serving a sentence for a misdemeanor, and was in jail with defendant, and conversed with him in 1895 before the trial; and that from December, 1894, defendant was in jail at White Sulphur Springs, charged with the killing of Macke; that Max Waterman, Esq., was his attorney from December, 1894, and was also the attorney of said Cook, and knew that Cook was one of the posse to arrest defendant; that another man, Pettibone, who made affidavit, was frequently at White Sulphur Springs after defendant was put in jail, and could easily have

been procured as a witness; that the witness as to the alleged statements of Macke after he was shot is in business at Castle, and his name is on the indictment, and his presence could easily have been procured.

The showing of diligence being wholly insufficient, the court did not err in denying the motion upon the grounds alleged.

10. It is contended by the learned counsel for the appellant that the district court has injected into this case a federal question, and that it arises in this manner: The court told the jury that a presumption is a deduction which the law expressly directs to be made from particular facts, and that a presumption, unless declared by law to be conclusive, may be controvertible by other evidence, direct or indirect, but, unless so controverted, the jury are bound to find according to the presumption. The court then gave this charge: "The following presumption is deemed conclusive: A malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another." The further charge was given that, among disputable presumptions, were these: That an unlawful act was done with an unlawful intent; that a person intends the ordinary consequences of his voluntary act.

It is argued that the charge, to the effect that a malicious and guilty intent, from the deliberate commission of an unlawful act for the purpose of injuring another, is a conclusive presumption, is an invasion of the exclusive right of the jury to judge of the facts in the case, and, furthermore, that this presumption declares a force to evidence greater and different than that existing at the time of the alleged murder of Macke inasmuch as it was only made a conclusive presumption by the Code of Civil Procedure, which was passed in 1895, and took effect subsequent to this homicide, and hence the statute is an *ex post facto* law.

The first inquiry before the court, therefore, is whether or not this statute has changed the rules of evidence as they existed prior to the adoption of the Code. If we take up the statute making malicious intent a conclusive presumption aris-

ing out of the evidence of the truth of the facts enumerated in the statute, we find that the words of the statute really resolve themselves into this: That if (1) the defendant killed Macke, and (2) if he deliberately killed him, and (3) if he deliberately killed him unlawfully, and (4) if he deliberately shot at him unlawfully, when he killed him, for the purpose of injuring him, then it is conclusive that, as a sequence of all these facts, he had a malicious and guilty intent. This is equivalent to saying that the deliberate and malicious commission of an unlawful act conclusively carries with it a malicious intent. The statute is axiomatic. A man cannot maliciously and purposely kill another without a malicious intent.

We must bear in mind that the statute makes a presumption a deduction from particular facts, and before this presumption of malicious intent can arise, all the facts from which alone it may arise must be proved by competent evidence, and beyond a reasonable doubt. Each element of fact included in the statute is rebuttable. Thus the defendant may deny that he committed the act at all; he may deny that the act was unlawful; he may deny that he deliberately committed it, or that he committed it for the purpose of injuring another. In his denials of these facts, doubtless, he may explain his motives and his purposes, his beliefs, and whether or not he reflected in his mind before he acted; and, if he should succeed in raising a reasonable doubt as to the existence of any of the four included elements, the jury could not be bound by a conclusive presumption that his intent was malicious. But if, on the other hand, he fails to raise any such doubt, and the state has satisfied the jury, beyond a reasonable doubt, by the evidence, that all of the four elements of fact did exist, then the law makes it binding upon them to deduce the conclusion that there was a malicious intent.

Now, by comparison with the law as it was before the Codes were adopted, the statute, when applied to homicide, is made up of the same elements which compose express malice as defined by section 19, div. 4, Criminal Laws, Compiled Statutes, which is as follows: "Section 19. Express malice is that

deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof."

Taking this definition of "express malice" as given in section 19, quoted above, we find that it, too, embraces these essentials: (1) There must be the intent to take away the life of a fellow creature. (2) The intent must exist to unlawfully take away that life. (3) The intent must be deliberate to unlawfully take away life. All these facts may be manifested by external circumstances capable of proof. Where they are so proven beyond a reasonable doubt, the law makes "malice." It might be illustrated in this way: A. is charged with the murder of B. He admits that he deliberately and unlawfully killed him (not justifiably, nor in necessary self defense), and that his purpose in firing the fatal shot was to injure him. From these admissions of fact, the law says the fact is regarded as proved, and there can be no evidence offered to rebut the presumption that there was a malicious intent in firing the shot. And such, we take it, was the rule of common law.

Mr. Justice Foster lays down, in his discourse on Homicide (261), that if an act unlawful in itself, but done deliberately and with intention of mischief or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue, against or beside the original intention of the party, it will be murder. But if such mischievous intention does not appear, which is matter of fact, and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter,—not accidental death, because the act upon which the death ensued was unlawful. (*Rex v. Martin*, 3 Car. & P. 211; *State v. Smith*, 2 Strob. 77; *Com. v. York*, 9 Metc. (Mass.) 93; Rice on Criminal Evidence, page 30.)

We do not deem it necessary to note the other alleged errors, further than to say that none of them are well founded.

Upon the whole case, we think the defendant has had a per-

fectly legal and fair trial. We must therefore affirm the judgment and order overruling the motion for a new trial. Further proceedings must be had as provided by statute. (*State v. Biggerstaff*, 17 Mont. 510.)

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

ON REHEARING.

[April 8, 1896.]

PER CURIAM.—By a motion or petition signed by the defendant himself and certified to by his counsel as well founded in point of law, in their opinion, the court is asked to grant a rehearing, and to reconsider certain propositions decided. We have gone over the various matters enumerated in the petition which were presented for review by the record. They were each and all fully considered, and, for the most part, are specifically discussed in the opinion rendered. Those not so specifically discussed were considered as wholly unsound, and, moreover, were not presented to us in argument or brief. Since the opinion in this case was announced, there has been published a decision by the supreme court of Utah, in *People v. Coughlin*, 44 Pac. 94, in direct accord with the views we expressed upon the law applicable to the facts of this case. The motion for a rehearing is denied.

STATE EX REL. TRAVELERS' INSURANCE COMPANY,
RELATOR, v. ROTWITT, SECRETARY OF STATE,
RESPONDENT.

[Submitted March 25, 1896. Decided March 30, 1896.]

CORPORATIONS—Legal organization—Secretary of state.—Under the provisions of the Civil Code relating to the organization of domestic corporations (§ 390 *et seq.*), the issuance by the secretary of state of a certificate that a certified copy of the articles of incorporation of a company, organized thereunder, containing the required statement of facts, has been filed in his office, is a prerequisite to the legal formation of a domestic corporation.

SAME—Foreign insurance company—Fees of secretary of state.—A foreign accident and life insurance company, wishing to do business within this state, is regulated by the provisions of sections 1030 *et seq.* of the Civil Code, requiring the filing with the secretary of state of a duly authenticated copy of its charter, together with a statement of its financial condition, and a certificate of consent to be sued, and is not within the requirement of subdivision 3, section 410 of the Political Code, that the secretary of state charge and collect for receiving and filing each certificate of incorporation the sum of fifty cents on each one thousand dollars of the capital stock of the company, since the certificate of incorporation referred to in this section pertains only to the certificate necessary to complete the legal organization of a domestic corporation. (*State ex rel. Aachen v. Munich Fire Insurance Co.*, 17 Mont. 41, cited.)

ORIGINAL PROCEEDING. Application for writ of *mandamus* to compel the secretary of state to file a copy of relator's charter and other papers required by law to be filed by foreign corporations. Writ granted.

Statement of the case by the justice delivering the opinion.

The plaintiff, the Travelers' Insurance Company, is an insurance corporation, organized and existing by special act of the general assembly of the state of Connecticut. The petition alleges that, before doing any business or making any contracts in the state of Montana, the petitioner appointed an agent and attorney in the county of Lewis and Clarke, state of Montana, upon whom service of process against it could be made, and filed in the office and with the state auditor a written instrument, signed by its president and secretary, authorizing such agent and attorney to acknowledge service of process, as is generally required by law; and also filed with the state auditor a certified copy of its charter, together with

a verified statement of the place of petitioner's location, the amount of its capital stock, and a detailed statement of the facts and items as required by section 583, Division 5 of the Compiled Statutes, and with the provisions of sections 669, 670, Chapter 1, Title IV of Part IV of Division 1, of the Civil Code of Montana (1895).

It is further alleged that, at the time of the filing of said certificate, charter and statement, the auditor of the state issued his certificate to the petitioner that it had complied with all the requirements of said chapter 29 (this section is above referred to) of the Fifth Division of the Compiled Statutes of Montana, and was entitled to do business in the state of Montana; that the petitioner had annually filed with the state auditor a statement, as required by chapter 29, hereinbefore referred to and by Chapter 1 of Title IV of Part IV, also hereinbefore referred to. It is next averred that the petitioner, for the purpose of complying with the provisions of Title XI of Part IV of Division 1 of the Civil Code (1895), entitled "Foreign Corporations," did, on the 20th day of March, 1895, present to the defendant, as secretary of state, a duly authenticated copy of its charter, and the amendments thereto; also, a statement, verified by the oath of the president and secretary, and attested by a majority of the directors, showing the name of the petitioner, the location of its principal office or place of business without this state, and the location of its principal office or place of business within this state, the amount of its capital stock, the amount of its capital stock actually paid in in money, the amount of its assets, and of what they consist, with the actual cash value thereof, and the amount of its liabilities, whether secured or not, and a certificate appointing an agent for the petitioner in Montana upon whom service of process might be made, together with the consent of such agent to act; that the petitioner demanded that said charter, statement, certificate and consent be filed in the office of the secretary of state, and tendered to the said defendant, the secretary of state, the fee for such filing, to wit, 25 cents for filing said charter, 25 cents for filing said state-

ment, and \$5 for filing said certificate and consent; but that defendant wrongfully refused to accept or file said charter, statement, certificate and consent, and refused the tendered fee therefor, but demanded a fee of \$500 for filing said charter, and notified the petitioner that he would not file the said charter and other papers except upon payment of said sum of \$500.

After alleging that the petitioner has no plain, adequate or speedy remedy at law, the petitioner closes with a prayer for an alternative writ of mandate, commanding the secretary of state to receive and file the papers enumerated upon payment of fees tendered, or show cause why he has not done so. An alternative writ was issued as prayed for. The respondent, as secretary of state, moved to quash the petition and writ for the reason that the same did not contain facts sufficient to warrant the relief prayed for.

McConnell, Gunn & McConnell and *John B. Clayberg*, for Relator.

Henri J. Haskell, Attorney General, and *Ella K. Haskell*, for Respondent.

HUNT, J.—The question raised by this proceeding is this: Is a foreign accident and life insurance company required to pay to the secretary of state the fees provided for in subdivision 3, § 410, Pol. Code 1895, which provides that the secretary must charge and collect for receiving and filing each certificate of incorporation the sum of 50 cents on each \$1,000 of the capital stock of any company or corporation: * * * Provided, that no additional fee shall be charged for filing and recording articles of incorporation.

Chapter 1, part IV, article I, of the Civil Code of 1895, pertaining to the organization of corporations under the laws of the state, after defining for what purposes corporations may be organized, provides, by section 402, that the instrument by which a private corporation is formed is called "Articles of Incorporation." Provision is next made for what the

articles must set forth, how they must be subscribed, and that, "upon filing and recording the articles of incorporation, in the office of the county clerk of the county in which the principal business of the company is to be transacted, and a copy thereof, certified by the county clerk, with the secretary of state, the secretary must issue to the corporation, over the great seal of the state, a certificate that a copy of the articles, containing the required statement of facts has been filed in his office; and thereupon the persons signing the articles, and their associates and successors, shall be a body politic and corporate. * * *"

The life of a corporation dates from its organization. The statute points out the manner in which corporations may be organized. When this statute is complied with, the corporation is then brought into existence. The statute is plain. Upon compliance with its certain specific provisions (that is, filing and recording), the secretary must issue a certificate that a copy of the articles containing the required statement of facts has been filed; and thereupon (that is, after filing and recording, and upon the issuance of the secretary of state's certificate that a certified copy of the articles of incorporation containing the required statement of facts has been filed), the persons signing the articles shall be a body politic and corporate. The certificate of the secretary to these facts, therefore, becomes a prerequisite to the legal formation of a corporation. (Morawetz on Private Corporations, § 27; *Walker v. Thompson*, 61 Me. 347; *Stowe v. Flagg*, 72 Ill. 397.)

For issuing this "certificate of incorporation" a specific fee of \$3 is provided, and for "filing and receiving" each certificate of incorporation the secretary of state shall charge 50 cents on each \$1,000 of the capital stock of any company or corporation; provided, that no additional fee shall be charged for filing and recording articles of incorporation.

This section refers to any corporation completely organized only by virtue of the issuance of the secretary's certificate, and not to corporations already organized and only asking a legal right to do business within the state. Foreign corporations organized under the laws of other states or countries, unless other-

wise regulated by law, are required to file in the office of the secretary of state duly authenticated copies of their charter or articles of incorporation, and a statement, as required by section 1030 *et seq.* (Civil Code, 1895.) This was decided in *State ex rel. Aachen & Munich Fire Insurance Co. v. Rotwitt*, 17 Mont. 41. The petitioner at bar concedes that it must comply with this requirement. And this is all we think it is obliged to do.

The certificate referred to in subdivision 3, of section 410, pertains to the incorporation of companies just being brought into existence. It is a certificate that a domestic corporation has been formed. Foreign corporations are already organized. Their legal organization as a fact is recognized expressly by section 1030, which regulates "foreign corporations," "organized" and wishing to do business in this state. Matters relating to the formation of such companies are controlled by the law in force at the places of their organization. Section 1030 of the Civil Code does not require a foreign corporation to file or record with the secretary of state a certificate of incorporation, or that it shall record any paper. It is simply obliged to file as evidence of the fact of a corporate existence elsewhere, and as a condition precedent to the right to business within the state, a duly-authenticated "copy of its charter or articles of incorporation," and a statement of its financial condition, as provided for by the first portion of section 1030 *et seq.* of the Civil Code, as heretofore interpreted by the court. As a certificate designating an agent to receive process is tendered in the case at bar, with a fee of \$5 for filing the same, the question of necessity of an insurance corporation filing such certificate at all is not before us. (*State v. Rotwitt, supra.*)

It would be a strained construction of the statute to hold that this foreign corporation, which only files a duly-authenticated copy of its charter, is included within the phrase "articles of incorporation" as used in section 410, subd. 3; and to require a foreign corporation, asking the privilege of doing business in the state, to go through the forms prescribed for the formation

of new corporations is against the letter of the law, and the spirit, too, we think.

The language of the various sections of the Code demonstrates that the legislative intent was not to impose severe exactions by way of fees upon solvent foreign corporations wishing to do business within the state, but to restrain the organization of corporations within the state, perhaps worthless in fact, but of apparently stupendous capital. Gathering this intent from the several expressions by way of statute, the petitioner is entitled to the relief asked. Let the writ issue as prayed for.

PEMBERTON, C. J., and DE WITT, J., concur.

STATE EX REL. FIDELITY & CASUALTY COMPANY
OF NEW YORK, RELATOR, v. ROTWITT, SEC-
RETARY OF STATE, RESPONDENT.

[Submitted March 25, 1896. Decided March 30, 1896.]

FOREIGN INSURANCE COMPANY—Agent to receive process—Mandamus to compel filing of certificate.—A foreign insurance company is not required to file a copy of its charter or articles of incorporation with the secretary of state, and where such company has fully complied with the statutory requirements relative to foreign insurance companies and has filed with the state auditor all papers required by the provisions of the Civil Code relating to stock and mutual insurance corporations (§§ 669, 670) it may compel the secretary of state by *mandamus* to file in his office a certificate designating an agent to receive process as required by section 1036 of the Civil Code. (*State ex rel. Aachen v. Munich Fire Insurance Co.*, 17 Mont. 41, cited.)

ORIGINAL PROCEEDING. Application for writ of *mandamus* to compel secretary of state to file relator's certificate designating an agent to receive process. Writ granted.

Statement of the case by the justice delivering the opinion.

The petitioner is an insurance corporation, organized and existing under the laws of the state of New York. Its purposes are to take insurance upon the health and against personal injury, disablement, or death resulting from traveling or

general accident by land or water, and guarantying the fidelity of persons holding places of trust, and in general to insure against loss, damage or liability which may be the subject of legal insurance, except the risks included in fire, marine and life insurance.

The petitioner alleges full compliance with the insurance laws in relation to the filing the name of an agent to receive process with the auditor of the state, and the certified copy of its charter, together with the detailed statements as required by section 583 *et seq.* of the Fifth Division of the Compiled Statutes of Montana, and generally that it has complied with the provisions of sections 669 and 670 of Chapter 1, Title IV of Part IV of Division 1 of the Civil Code. The petitioner avers that the certificate of authority and license to do business as issued by the auditor of the state is still in force and effect; that the petitioner presented to the defendant, as secretary of state, a certificate appointing an agent, together with the consent of the person so appointed to act as such agent, and demanded that the certificate and consent be filed in the office of the secretary of state, and tendered to the secretary the fee for such filing, together with the sum of five dollars, but that the defendant refused to accept or file said certificate and refused the tendered fee therefor.

An alternative writ of mandate was issued. Demurrer was filed on the ground that the petition did not state facts sufficient to entitle the petitioner to relief.

McConnell, Gunn & McConnell, for Relator.

Henri J. Haskell, Attorney General, and *Ella K. Haskell*, for Respondent.

HUNT, J.—It appears by the averments of the petition that the plaintiff has complied fully with the statutes of the state relative to foreign insurance companies, and has filed with the state auditor all papers and certified copies and statements required by Title IV, Chapter 1, of the Civil Code, relating to stock and mutual insurance corporations. By the authority of

the decision in *State v. Rotwitt*, 17 Mont. 41, the petitioner is not required to file a copy of its charter or articles of incorporation with the secretary of state. As the petitioner has tendered a certificate designating an agent to receive process, as required by section 1036, Civil Code, and the fee of five dollars for filing the same, it is unnecessary to decide whether or not such certificate is required by law to be filed in the respondent's office. Let the writ issue as prayed for.

PEMBERTON, C. J., and DE WITT, J., concur.

STATE EX REL. THE THOMAS CRUSE SAVINGS
BANK, APPELLANT, v. GILLIAM, AS SHERIFF
OF JEFFERSON COUNTY, RESPONDENT.

[Submitted February 25, 1896. Decided March 16, 1896.]

MORTGAGES—Extension of period for redemption—Constitutional law.—Section 1235 of the Code of Civil Procedure of 1895, allowing judgment debtors one year in which to redeem, is applicable to a decretal sale of mortgaged premises thereafter made although at the time the mortgage was given the period for redemption was six months. Such extension of the period for redemption does not impair the obligation of the contract between the mortgagor and the mortgagee when the latter becomes the purchaser, because by purchasing his character as mortgagee ceases and he necessarily subjects himself to the law then in force defining the rights of purchasers. Nor is the obligation of the contract impaired by the fact that such extension may tend to reduce the number and amount of bids at the foreclosure sale, for such contingencies are too remote to justify the conclusion that such legislation affected the value of the mortgage contract. *

Appeal from Fifth Judicial District, Jefferson County.

MANDAMUS to compel the issuance of a sheriff's deed at the expiration of six months from the sale of mortgaged premises under a decree of foreclosure. The writ was denied by SHOWERS, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an appeal from the judgment of the district court rendered in favor of the respondent, upon dismissing the relator's application for a writ of *mandamus*. Relator, in the

*This decision reversed on rehearing, see *post*, 100.

district court, asks for the writ commanding the respondent, who was sheriff of Jefferson county, to execute and deliver to it a deed of real estate sold upon judgment foreclosing a mortgage upon the same. The petition set forth that on January 5, 1892, George S. Kennedy and wife, executed to relator, to secure an indebtedness, a mortgage upon the real estate described in the petition; that on March 5, 1895, relator commenced an action to foreclose the mortgage, in which action judgment was rendered July 2, 1895. The judicial sale took place August 3, 1895. Six months having expired on February 4, 1896, the relator demanded a deed from the respondent, the sheriff. The respondent refused to make the deed, alleging as a reason that the time for redemption was one year instead of six months, and that the deed was not due until August 3, 1896.

These facts were all set up in the petition, and were by the district court considered insufficient upon which to issue the writ of *mandamus*. The contention is based upon the fact that, when the mortgage was given, the redemption period under the law was six months. On July 1, 1895, the law went into effect which made the redemption period one year. The respondent, the sheriff, stood upon the statute as enacted, and refused to make the deed. The appellant's contention was that the statute of July 1, 1895, was unconstitutional and void as to this mortgage, in that it was enacted after the mortgage was given, and thus impaired the obligation of the contract between the mortgagor and mortgagee. (Constitution Mont., Art. III, § 11, and Constitution U. S., Art. I, § 10.)

T. J. Walsh, for Appellant.

Section 1235 of the Code of Civil Procedure, providing that the judgment debtor may redeem the property from the purchaser at any time within one year after the sale, is unconstitutional in so far as it denies to a mortgagee, whose mortgage was executed prior to its adoption, a right to a deed after the expiration of six months from the date of the sale. (U. S.

Constitution, § 10, Art. I; Mont. Constitution, § 11, Art. I; *Id.* § 13, Art. XV.) The identical question involved in this case came before the supreme court of the United States in *Bronson v. Kinzie*, 1 How. 311, upon the validity of a statute of the State of Illinois. There was no redemption statute in that state prior to the enactment of the one involved, which provided that the debtor should have a year to redeem and that the property should not be sold unless it brought two-thirds of the appraised value. Prior thereto sales were made in chancery and a deed delivered upon confirmation. The court held the statute void, declaring both of the provisions unconstitutional. See, also, *Ex parte The City Bank*, 3 How. 328; *Howard v. Bugbee*, 24 How. 461. The text writers uniformly regard these cases as settling the doctrine that the period of redemption from mortgage foreclosure sales cannot be extended as to mortgages in existence at the time of the change. (Black on Constitutional Prohibitions, 105; Cooley on Constitutional Limitations, 352; Wade on Retroactive Laws, 125; Sedgwick on Statutory and Constitutional Construction, 615, note on Redemption Laws and page 626; Hare Am. Constitutional Law, 699 *et seq.*) The following additional cases are selected by reason of the directness of their bearing upon the invalidity of the statute in question: *McCracken v. Hayward*, 2 How. 608; *Gantley v. Emery*, 3 How. 716; *Scobey v. Gibson*, 17 Ind. 572; *Maloney v. Fortune*, 14 Ia. 417; *Rosier v. Hale*, 10 Ia. 470; *Coddington v. Bispham*, 36 N. J. L. 574; *Baldwin v. Flagg*, 43 N. J. L. 495; *Allen v. Allen*, 95 Cal. 184; *Robards v. Brown*, 40 Ark. 423; *Collins v. Collins*, 79 Ky. 88; *Phinney v. Phinney*, 81 Me. 450. It is usually said in support of similar enactments, that the legislature may change the remedy. How little real substance there is to this contention is made apparent by the foregoing authorities. Even before the cases of *Bronson v. Kinzie*, and *Howard v. Bugbee* it was said in *Green v. Biddle*, 8 Wheat. 1: "It is no answer that the acts of Kentucky now in question are regulations of the remedy, not of the right to the lands. If these acts so change the nature and extent of the existing remedies

as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they directly overturned his interests." See, also, *Clark v. Reyburn*, 8 Wall. 322; *Walker v. Whitehead*, 16 Wall. 314; *Gunn v. Barny*, 15 Wall. 610; *Sibert v. Lewis*, 122 U. S. 284; *Edwards v. Karzey*, 96 U. S. 595; *United States v. Mayor*, 8 Wall. 575; *State v. City of N. O.*, 102 U. S. 203, and *Kring v. Missouri*, 107 U. S. 221; *Brine v. Insurance Co.*, 96 U. S. 627. The state of Kansas has furnished a variety of precedents on this interesting and important question: *Bixby v. Bailey*, 11 Kan. 359; *Ogden v. Walters*, 12 Kan. 283; *Watkins v. Glenn*, 40 Pac. Rep. 316; *Beverly v. Barnitz*, 40 Pac. Rep. 325, overruled in 42 Pac. Rep. 725. The remark in the later opinion in this case to the effect that it is desirable to so place the matter as to obtain a ruling upon the point from the supreme court of the United States, very sensibly detracts from the value of this case as a precedent.

E. W. Toole, for Respondent.

Counsel relied upon *Beverly v. Barnitz*, 42 Pac. Rep. 725, as decisive of the question involved in this appeal.

DE WIRT, J.—As noted in the statement, the only question in this case is whether the statute, having been enacted after the mortgage was executed, and which extended the time of redemption, is constitutional. Does the statute impair the obligation of the contract, or does it reach the remedy only? This case has been very ably briefed by learned counsel on each side. Appellant's counsel opens his discussion with the following appropriate remarks:

"This vexed question, involving the subtle distinction between the *obligation* of a contract and the *remedy* for its enforcement, after slumbering for a period, has gained prominence on account of recent legislation in some of the Western states looking to some extent to the relief of the debtor classes. The great financial distress that has led to the enactment of these laws has inclined the courts to carefully examine the de-

cisions heretofore made upon the subject, the provisions of the federal and state constitution in relation to it, and solve the question in favor of the just and humane objects sought to be accomplished, if the same comes within the domain of legitimate legislation. Hence we keenly appreciate the desire of this honorable court to maintain in letter and spirit the salutary provisions of the fundamental law of the land, by preserving intact the obligations of a contract, and at the same time avert the disappointment of reasonable expectations that would result from declaring such laws invalid. The important question here to be determined is whether the act of the legislative assembly of this state in *extending* the time of redemption upon the sale of the mortgaged premises impairs the obligation of the contract, or so operates upon the remedy, only, as to afford suitable and proper means for its enforcement."

It is quite true, as counsel suggests, that we are deeply sensible of the importance of the constitutional question here involved; and, furthermore, we may add, that we approached its consideration with a strong preconception against the constitutionality of the statute.

Chief Justice Martin, of the supreme court of Kansas, said, in his able discussion of a similar statute: "From causes upon which all do not agree, and that we need not discuss, the burden of a private debt has been enormously increased of late years. Farms valued five years ago both by borrower and lender at \$3,000 or \$4,000, and mortgaged for \$1,000 are now knocked down under the sheriff's hammer for less than the mortgage debt, the accumulations of a lifetime being often swept away by the shrinkage, and this through no fault of the mortgagor." (*Beverly v. Barnitz*, (Kan. Sup.) 42 Pac. 731.)

The commercial and political conditions mentioned by the Kansas decision did not exist in this state to any such extent as they did in Kansas, and we do not know that the considerations, which it seems, moved the Kansas legislation, influenced ours. Our statute came in with the new Codes of 1895. But the suggestion even of the existence of any sentiment such as that expressed in the Kansas decision causes a court to hesitate

and scrutinize closely, lest it may be that a statute passed in times of financial depression has overridden the fundamental law of the constitution; for the constitution is for good times and bad times, for adversity as well as prosperity. Entertaining such views, and having planted them in the decisions of this court upon the constitutional questions which we have heretofore considered, we approached the present matter with the apprehension that, perhaps the legislature had yielded to some sentiment of commiseration for the present debtor, and forgotten the chart and compass of the constitution. But this apprehension has been gradually and effectually dissipated by a renewed study of the cases from *Sturges v. Crowninshield*, 4 Wheat. 122, to *Morley v. Railway Co.*, 146 U. S. 162, 13 Sup. Ct. 54; and in the state courts, the cases of *State v. Sears* (Or.) 43 Pac. 482, and *Beverly v. Barnitz* (Kan. Sup.) 42 Pac. 725. The learning and reasoning upon this question has recently been thoroughly collected in the cases from Kansas and Oregon above noted.

While the question here presented is one under the state constitution, it is also a federal question, under the constitution of the United States; and, so viewing it, we are of opinion that the Kansas and Oregon decisions are sustained by the cases in the United States supreme court decided subsequent to *Bronson v. Kenzie*, 1 How. 311, *McCracken v. Hayward*, 2 How. 608, and *Howard v. Bugbee*, 24 How. 461. The Kansas and Oregon cases above mentioned ably review the history of this question as it has been treated in the United States decisions, especially the following cases: *Sturges v. Crowninshield*, 4 Wheat. 122; *Bronson v. Kinzie*, 1 How. 311; *Terry v. Anderson*, 95 U. S. 628, *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91; *Insurance Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. 236; *Morley v. Railway Co.*, 146 U. S. 162, 13 Sup. Ct. 54; *Ogden v. Sanders*, 12 Wheat. 215; *Louisiana v. New Orleans*, 102 U. S. 203; *Curtis v. Whitney*, 13 Wall. 68; *Edwards v. Kearzey*, 96 U. S. 595; *Seibert v. Lewis*, 122 U. S. 284, 7 Sup. Ct. 1190; *Clark v. Rayburn*, 8 Wall. 318; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420

Cordially concurring, as we do, with the decisions of the Kansas and Oregon courts, and finding our reasons for such concurrence in the same United States supreme court cases discussed by them, and they having so thoroughly occupied the field before we reached it, it would seem, perhaps, to be an affectation of original research to write at much length in this opinion. But the importance of the case probably demands some setting forth of our reasons for holding that the United States supreme court decisions are to the effect that our law of 1895 is not unconstitutional.

While our constitution forbids the legislature from passing a law impairing the obligation of contracts, the same inhibition is found in the constitution of the United States; and therefore the supreme court of the United States is the court of final resort upon this question. That being true, we now base our decision upon the doctrines as announced by the United States supreme court since *Bronson v. Kinzie* and some of the cases immediately following it.

Passing that early landmark in the history of the construction of article 1, § 10, Const. U. S., to-wit: *Sturges v. Crowninshield* (1819) 4 Wheat. 122, in which Chief Justice Marshall, as said by Chief Justice Martin of Kansas, "well-nigh exhausted the subject," we encounter *Bronson v. Kinzie*, (1843) 1 How. 311, that much quoted, canvassed, approved, and criticised case. There were two points in that case, but there is only one with which we have now to do. It was there held that a law passed subsequent to the execution of the mortgage in question, which law gave the mortgagor twelve months in which to redeem, was void under article 1, § 10, of the constitution of the United States. The case came from the state of Illinois, where the common-law view of the nature of a mortgage fully obtained. Upon this point, Chief Justice Taney, in rendering the decision, said: "We proceed to apply these principles to the case before us. According to the long-settled rules of law and equity in all of the states whose jurisprudence has been modeled upon the principles of the common law, the legal title to the premises in question vested in the complainant, upon

the failure of the mortgagor to comply with the conditions contained in the proviso; and at law he had a right to sue for and recover the land itself." (*Bronson v. Kinzie*, 1 How. 318.)

There was nothing new in *McCracken v. Hayward*, 2 How. 608, or *Howard v. Buqbee*, 24 How. 461. They were decided upon the authority of *Bronson v. Kinzie*. But the common-law view of a mortgage no longer obtains in most of the states of the Union. As shown in *Beverly v. Barnitz* and *State v. Sears*, *supra*, that idea is "cut up by the roots;" and with us, in these days, a mortgage is simply a security for a debt. It is so in Montana. Therefore, whatever reason, if any, *Bronson v. Kinzie* obtains from the fact that the legal title to the real estate vested in the mortgagee upon failure of the mortgagor, disappears from the case when it is sought to apply it as an authority upon the modern commercial view that a mortgage is simply a security. Therefore, the contract between mortgagor and mortgagee, before us for examination, was not in any way a conveyance of the real estate, but was simply a contract that the mortgagor would pay a certain sum of money. The mortgage was given as security for such payment. The payment was not made. The foreclosure of the security was had. The relator here bought on foreclosure sale. The relator then ceased to be a mortgagee, and became a purchaser, and the debt was extinguished in whole, the sale being for a sum sufficient to pay the whole debt. Then, and then only, did the relator approach the relations of owner of the real estate. Never before did it have anything like a title. Therefore it was simply a creditor of the mortgagor, having a security upon the mortgagor's real estate. By purchase at the foreclosure sale, it first came into proprietary relations to the real estate; and at the same time its position as mortgagee ceased wholly, and its position as creditor as well. Therefore, we must proceed to look at the relator, formerly a mortgagee, as now a purchaser, and ascertain whether a law had been passed impairing the obligation of the contract of purchase. We are satisfied that the decisions of the United States supreme

court hold that the obligation of that contract was not thus impaired. The law was passed before relator purchased, and he purchased under the law of 1895, existing upon the day of his purchase. Upon this subject the opinion in the Kansas case above cited, says: "The act of 1893 does not operate upon the rights of the mortgagee until his claim as such has been extinguished, either wholly or to the full extent of the proceeds of the sale of the mortgaged property. The mortgagor, it is true, may redeem the land within a certain time, by payment of the sale price, and interest thereon, but this is a matter wholly between him and the purchaser. If the mortgagee or judgment creditor has deemed it best to become the purchaser, and thus voluntarily change his relation, it is difficult to see how he has any just cause to complain. By the mortgage contract, the real estate was pledged for the payment of the debt, subject to the equity of the redemption. The state, by its proper officer, has, at his instance, sold the property for its payment; and, after he gets the proceeds of the sale, he has no further claim upon the property, although he may proceed by general execution to obtain any balance due by seizure and sale of other property." (*Beverly v. Barnitz* (Kan. Sup. 42 Pac. 729.)

See, also, the following remarks in the Oregon case: "The relator obtained no title or interest in the mortgaged premises by its contract, but only a lien thereon, and a right to subject the property to sale to satisfy its claim; and this right has in no way been altered, abridged, or postponed by the act of 1895. How can it be claimed, then, that this act impairs any of the obligations of the contract? It is true, 'the law which binds the parties to perform their agreement' forms part of the obligations of the contract; but the act of 1895 does not postpone or lessen the duty of performance by the mortgagor. It does not diminish his duty to pay his debt at the time and in the manner agreed upon, or take away or interfere with any of the mortgagee's remedies to enforce its lien by subjecting the mortgaged premises to sale. The statute existing at the time the mortgage was given, prescribing the time in

which the mortgagor shall redeem from the purchaser at a foreclosure sale, if one should be made, had no relation whatever to the contract between the mortgagor and mortgagee. The purchaser's right depends upon the law in force at the time of the sale, and why shall he be permitted to appeal to the contract between the debtor and creditor? He is not a party or privy to such contract in any sense; and it does not alter the case that the purchaser and mortgagee are one and the same person. The relator ceased to be a mortgagee when the sale occurred. Thenceforward its interest in the property was as purchaser, and not as mortgagee; and to require it, as such purchaser, to conform to the law in force when the purchase was made, does not in any way impair the obligations of the mortgage contract." (*State v. Sears* (Or.) 43 Pac. 485.)

But as this is finally a federal question, the decisions of the United States supreme court are more important as authority. We therefore turn to *Insurance Co. v. Cushman*, 108 U. S. 51, 2 Sup. Ct. 236. In that case the court had under consideration a statute which reduced the rate of interest on redemption of the real estate sold on a mortgage foreclosure from ten per cent. to eight per cent. Mr. Justice Harlan, rendering the opinion said: "The statute in force when the mortgage was executed, prescribing the rate of interest which the amount paid or bid by the purchaser should bear, as between him and the party seeking to redeem, had no relation to the obligation of the contract between the mortgagor and the mortgagee. The mortgagor might, perhaps, have claimed that his statutory right to redeem could not be burdened by an increased rate of interest beyond that prescribed by statute at the time he executed the mortgage. But, as to the mortgagee, the obligation of the contract was fully met when it received what the mortgage and statute in force when the mortgage was executed entitled it to demand. The rights of the purchaser at the decretal sale, if one was had, were not of the essence of the mortgage contract, but depended wholly upon the law in force when the sale occurred. The company ceased to be a mort-

gagee when its debt was merged in the decree, or, at least, when the sale occurred. Thenceforward its interest in the property was as purchaser, not as mortgagee. And to require it, as purchaser, to conform to the terms for the redemption of the property as prescribed by the statute at the time of purchase, does not, in any legal sense, impair the obligation of its contract as mortgagee. It assumed the position of a purchaser, subject, necessarily, to the law then in force defining the rights of purchasers."

A kindred subject is treated later in the United States supreme court, as to which Chief Justice Martin, of Kansas, says: "In *Morley v. Railway Co.*, 146 U. S. 162, 13 Sup. Ct. 54, it was held that the state was not forbidden by the clause of the federal constitution under consideration from legislating, within its discretion, to reduce the rate of interest upon judgments previously obtained in its courts, the judgment creditor having no contract whatever in that respect with the judgment debtor. The court held that the state law regulating the rate of interest on judgments formed no part of the contract." (*Beverly v. Barnitz* (Kan. Sup.) 42 Pac. 727.)

The United States supreme court decision in *Insurance Co. v. Cushman* seems to us to be conclusive. It holds that, when the relator became a purchaser, it was like any other purchaser, and had been divorced from its character as mortgagee, and must be treated as a purchaser solely; and, as such purchaser, the law does not impair the obligation of any contract which it as such had. That the whole history of decision in the United States supreme court since the time of *Bronson v. Kinzie* has been to the effect that the law which we are now considering does not impair the obligation of the contract between the mortgagor and mortgagee when the latter becomes the purchaser is ably shown by Mr. Chief Justice Martin in his review of the history of the question in the United States supreme court. After reviewing in detail and quoting from the decisions of that court (listed above in this opinion) which have treated a large number of statutes, and held them not to be within the inhibition of article 1, § 10, of the constitution

of the United States, the learned chief justice of Kansas makes the following able summary of the position of the United States supreme court upon this subject :

“ If a state legislature may totally abolish imprisonment of the debtor as a means of enforcing payment; if it may shorten the statutes of limitation; if it may reasonably extend and enlarge exemptions of property from sale for the payment of debts; if, where coupons are by law made receivable in payment of taxes, it may require such payment in the first instance in cash, to be afterwards refunded, and the coupons taken up; if it may reduce the rates of interest on redemption from decretal sales; if it may lessen the interest on former judgments; if it may require the holder of a tax-sale certificate to give three months’ notice of the time when a tax deed will be applied for; if it may require transcripts of judgments against a particular city to be filed in a certain office, as a prerequisite to payment, and divest the courts of the power to grant remedies in force when the judgments were rendered; if it may reduce the terms of court, in number and duration; if it may amend the laws as to attachments, garnishments, and receivers so as to take away causes therefor which were before sufficient; if, in short, ‘ it may regulate at pleasure the modes of proceeding ’ in the courts, and all this as to existing obligations,—it is difficult to frame a process of reasoning which would forbid it from so regulating the procedure upon the foreclosure of mortgages as to define and make more certain the indefinite estate impliedly reserved by every mortgagor of real property, and called into active existence only by the foreclosure, and which indefinite estate is extended by the federal courts of equity for six months in the first instance, and afterwards, ‘ once or oftener,’ in the discretion of the chancellor, according to the circumstances of the case. Even if the statute in question should impair the remedy formerly grantable upon a foreclosure, yet it should not for this reason be held invalid, for there is no constitutional inhibition against an impairment of the general remedies for the enforcement of broken contracts; and each and every of special examples just

cited is an instance of the impairment or abolition of a remedy allowable and in force when the obligation was incurred. Upon the whole, it does not appear that any judgment or decision of the supreme court of the United States requires this court to hold said chapter 109 unconstitutional, whatever may have been remarked by judges in delivering their opinions; for it is quite impossible to harmonize all that they have said, although the judgments or decisions may not be in conflict. Even doubt of the constitutionality of said chapter is not sufficient to warrant its judicial condemnation, especially by this court. In such case it seems better to leave such condemnation to the final arbiter,—supreme court of the Union.” (*Beverly v. Barnitz* (Kan. Sup.) 42 Pac. 732.)

It thus appears to us that, if the precise question now before us should come to the United States supreme court for decision, the court would, by force of its own prior decisions, hold that this law under consideration is not unconstitutional. That seems to us to be settled by the later cases, notwithstanding the case of *Bronson v. Kinzie*. Indeed, we are wholly unable to distinguish *Bronson v. Kinzie* from *Insurance Co. v. Cushman*, so that both decisions can stand together. We do not understand why extending a redemption period and reducing the rate of interest upon redemption are not exactly alike as to the impairing or not impairing the obligation of the mortgage contract. We venture the suggestion that, if one statute impairs the obligation, the other does also. The United States supreme court, in the later case of *Insurance Co. v. Cushman*, does not attempt to distinguish its decision from the earlier decision in the case of *Bronson v. Kinzie*. In fact, the opinion in the later case does not mention the earlier case. We can reach no other conclusion than that *Insurance Co. v. Cushman* overrules the principle of *Bronson v. Kinzie*. If our view in this respect is correct, then the force of the *Insurance Co. v. Cushman* case is the stronger as a present authority, by reason of the existence of the modern view that a mortgage is security only. Therefore, under the views promulgated by the decisions of the United States supreme court,

the statute which we are considering does not impair the obligation of the contract, unless it be upon one other ground which we have not before mentioned, and which we will now examine.

It is suggested that the obligation of the contract is impaired, in that the extending of the time for redemption would tend to reduce the number of bidders and the amount of bids at the mortgage foreclosure sale. This contention of the relator was decided adversely to him in the *Kansas* and *Oregon* cases above discussed. But, without quoting from them, we will again seek the authority which must be final with us on this question. The same contention was made in *Insurance Co. v. Cushman*, and was disposed of by Mr. Justice Harlan in the following language:

“But it is insisted that the value of the mortgage contract was impaired by a subsequent law reducing the interest to be paid to a purchaser at decretal sale; this upon the assumption that the probability of the debt being satisfied by the decretal sale of the property was lessened by reducing the interest which any purchaser could realize on his bid in the event of redemption. In other words, the reduction by a subsequent statute of the interest to be paid to the purchaser would, it is argued, necessarily tend to lessen the number of bidders seeking investments, and thereby injuriously affect the value of the mortgage security. In support of this proposition counsel cites several decisions of this court in which it is ruled that the objection to a law, as impairing the obligation of a contract, does not depend upon the extent of the change it effects; that the laws in existence when a contract is made, including those which affect its validity, construction, discharge and enforcement, enter into and form a part of it, measuring the obligation to be performed by one party, and the rights acquired by the other; and that one of the tests that a contract has been impaired is that its value has been diminished, when the constitution prohibits any impairment of all of its obligation. (*Green v. Biddle*, 8 Wheat. 1; *McCracken v. Hayward*, 2 How. 608; *Bank v. Sharp*, 6 How. 301; *Edwards v. Kearney*, 96 U. S. 595.)

These decisions clearly have no application to the case now before the court. The laws with reference to which the parties must be assumed to have contracted when the mortgage was executed, were those which, in their direct or necessary legal operation, controlled or affected the obligations of such contract. We have seen that no reduction of the rate of interest, as between the purchaser of the mortgaged property at decretal sale and the party entitled to redeem, affected, or could possibly affect, the right of the insurance company to receive, or the duty of mortgagor to pay, the entire mortgage debts, with interest as stipulated in the mortgage up to the decree of sale; and the result of the sale in this case shows that the company, as mortgagor, has received all that it was entitled to demand. The reduction of the rate of interest by the act of 1879 was by way of relief to the mortgagor and his judgment creditors, and in no sense an injury to the mortgagee. When that act was passed, there was no person to answer the description, or to claim the rights of a purchaser. Consequently, no existing rights were thereby impaired. That the reduction of interest to be paid to the purchaser would lessen the probable number of bidders at the decretal sale, and thereby diminish the chances of the property bringing the mortgage debt, are plainly contingencies that might never have arisen. They could not occur unless there was a decretal sale, nor unless the mortgagee became the purchaser, and are too remote to justify the conclusion, as matter of law, that such legislation affected the value of the mortgage contract." (*Connecticut M. I. Ins. Co. v. Cushman*, 108 U. S. 65, 2 Sup. Ct. 236.)

Having thus satisfied ourselves that the question before us is practically settled against the relator by the decisions of the United States supreme court, and that *Bronson v. Kenzie* has by later decisions lost all of its authority upon the question at bar, we shall affirm the judgment of the district court in dismissing the petition for a writ of *mandamus*, and shall hold, directly upon the merits, that the sheriff's deed in this case can be demanded only at the expiration of one year after the sale. Code Civ. Proc. 1895, § 1235.

We have not omitted to examine the case of *Wilder v. Campbell*, in the supreme court of Idaho, January 31, 1896 (43 Pac. 677). That case took a view the opposite to that which we here hold. There is nothing in the Idaho case to cause us to change our views. In fact, we are of opinion that this important question was not fully or fairly presented to the Idaho court. The opinion seems to approve *Bronson v. Kinzie*, but does not mention *Insurance Co. v. Cushman*, or *Morley v. Railway Co.* It also cites with approval *Watkins v. Glenn* (Kan. Sup.) 40 Pac. 316, but does not mention the overruling of that case in *Beverly v. Barnitz* (Kan. Sup.) 42 Pac. 725.

The judgment is affirmed.

Affirmed.

HUNT, J. concurs.

ON REHEARING.

[Decided July 13, 1896.]

DE WITT, J.—Our opinion was delivered and the decision made in this case on March 16th, 1896. At that time we were informed that the case of *Barnitz v. Beverly* had been appealed to the United States supreme court. We, therefore, required the clerk of this court to hold the remittitur. The published report of *Barnitz v. Beverly* in the United States supreme court has recently reached us, and we granted a rehearing in this case of our own motion.

The United States supreme court in *Barnitz v. Beverly* reversed the Kansas supreme court, 16 S. C. Rep. page 1042, and also as well overruled, on principle, our decision in this case at bar, rendered on March 16th, last. We, having decided this case on a federal question solely, and our decision being in accord, on principle, with the United States supreme court, at the date of its rendition and our decision of the fed-

eral question being since directly overruled by the supreme court, shall now place ourselves in accord with the latest decision of the superior tribunal upon this subject. Therefore, the judgment of this court, instead of remaining as rendered on March 16th will now be that the judgment of the district court be reversed, and the district court be directed to issue the writ of *mandamus* as prayed for.

Reversed.

HUNT, J., concurs.

PEMBERTON, C. J., not sitting.

BOARD OF COMMISSIONERS OF MEAGHER COUNTY,
RESPONDENT, v. GARDNER, COUNTY ASSESSOR,
ET AL., APPELLANTS.

[Submitted March 24, 1896. Decided March 30, 1896.]

COUNTY ASSESSOR—*Poor tax*.—Section 1790, Fifth Division of the Compiled Statutes (1887) making it the duty of the county assessor to collect the poor tax, providing for the manner of collection and creating a liability on the officer's official bond for the money so collected, was a law of the territory upon the admission of the state and had not been repealed by prior amendatory and repealing acts.

SAME—*Official bond—Liability of sureties*.—Where a former statute providing for the collection of poor taxes by the county assessor also provided that he should be liable on his official bond for the money so collected, was practically reenacted in a subsequent act, with the exception of the provision in respect to liability on his bond, this omission does not release his official sureties from liability for taxes collected and embezzled by him subsequent to such reenactment, where the condition of the bond was that the assessor would pay over all moneys coming into his hands as such officer.

SAME—*Official bond—Sureties—Estoppel—Constitutional law*.—Sureties upon the official bond of a county assessor, upon whom was imposed by statute the duty of collecting poor taxes, and whose bond was conditioned that he would pay over the moneys so collected, are estopped from contending that the statute imposing such duty is in conflict with section 5, Article VI of the constitution, which provides that the county treasurer shall be collector of taxes.

Appeal from Sixth Judicial District, Meagher County.

ACTION on official bond of county assessor. Defendant's demurrer to the complaint was overruled by HENRY, J., and judgment entered for plaintiff. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an appeal by the defendants from a judgment entered against them upon the overruling of their demurrer to the complaint. The question therefore is, does the complaint state a cause of action?

Defendant Gardner was assessor of Meagher county. Defendants Moore and Anderson were sureties on his official bond. Gardner's term of office commenced November 8, 1889, and ended January 2, 1893. The complaint sets up the facts of his election and qualification, and the giving of his bond for \$2,000, with the following condition :

"Now, therefore, if the said Ben D. Gardner shall faithfully and impartially discharge the duties of his said office of assessor, and render a true account of all moneys, credits, accounts and property of any kind that shall come into his hands as such officer, and pay over and deliver the same according to law, then the above obligation is void; otherwise to remain in full force and virtue."

This bond was duly approved and accepted. Part of his duties was to collect the poor tax, of \$2 per caput. Between March 6, 1891, and January, 1893, said Gardner, as assessor, collected and retained said poor tax, in a sum exceeding \$2,000. This amount he wholly failed to account for, or pay over to the treasurer of the county, but, on the other hand, converted and embezzled the same. The amount of his official bond has been demanded by plaintiff from the defendants, and the same has not been paid.

The demurrer was upon the ground that the complaint did not set forth facts sufficient to constitute a cause of action. No service was made upon the defendant Gardner, and no appearance was made in his behalf. The sureties alone are defending this action.

Smith & Gormley, for Appellant.

1. At the time the bond was executed there was no statute making it the duty of the assessor to collect the poor or poll

tax. Section 1790, page 1149, Compiled Statutes (Act of March 12, 1885) was an amendment of Section 1021, Chapter 53, Revised Statutes, and was repealed by the act of September 14, 1887, which repealed all of Chapter 53 of the Revised Statutes, and the assessor was not required to collect the poor tax or any other tax.

II. Even if there was a statute in existence requiring the assessor to collect the poor tax at the time the bond was given, it was repealed by article XVI, section 5 of the constitution which provides that the county treasurer "shall be collector of taxes."

III. The duty of collecting the poll tax, which is the subject of the breach complained of, was imposed upon the assessor by the act of March 6, 1891. By this act a new duty was imposed upon that officer of an entirely different nature and character from the duties required of him at the time he took the oath of office and executed his bond. Where, after an official bond is given, new duties are added that differ from the former ones, not in degree, but in kind and character, then the bondsmen are not liable for a failure on the part of the officer to perform the superadded duties. (Murfree on Official Bonds, §§ 193, 646-50, 711-714; *Territory v. Carson*, 7 Mont. 417; *White v. East Saginaw* (Mich.), 6 N. W. Rep. 86; *United States v. Singer*, 15 Wall 122; *People v. Edwards*, 9 Cal. 286; *People v. Ross*, 38 Cal. 76; *Love v. Baehr*, 47 Cal. 364; *Cosman v. Nightingill*, 1 Nev. 274.) The offices of assessor and treasurer are constitutional offices, and the duties that pertain to them should be construed in the light of the constitution. As the constitution declares that the treasurer shall be the collector of taxes, the duty of collecting taxes is therefore foreign to the office of assessor. (*Love v. Baehr*, 47 Cal. 364.)

IV. Appellants claim further, however, that the act of March 6, 1891, was unconstitutional because it took away from the county treasurer a duty imposed upon him by the constitution, viz., the collecting of taxes. If the legislature can take away part of the duties of a constitutional officer, it

can take away all the duties and thereby abolish the office. (§ 5, Article XVI, Constitution of Montana.)

V. Section 1790 provides, among other things: "The assessor shall be liable on his official bond for the nonperformance of his duties in collecting said poor tax, and for money collected therefor by him," and the board of county commissioners is authorized to require him to give additional bond for such purpose. Subsequently and prior to the collection of the moneys described in the complaint, on March 6, 1891, the legislature enacted the general revenue law of that year, and in that act provided for a per capita tax to be known as a "poll tax," the proceeds of which were to be paid into the county treasury for the exclusive use of the "poor fund" of the county. (Laws 1891, pp. 122-125, §§ 163-182.) A careful reading of the law shows that it was meant to be a substitute for the section above quoted relative to the "poor tax." Where the statute is evidently intended to revise the whole subject treated in a former statute and to be a substitute therefor, it repeals such former statute, and all omitted parts. (*Clay County v. Chickasaw County* (Mich.), 1 So. Rep. 753; *Treadwell v. Yolo County*, 62 Cal. 563.) The legislature of 1885 undoubtedly recognized that the duty of collecting poor tax was not one for which the assessor was liable on his official bond; otherwise it would not have provided that he and his bondsmen should be liable for money collected. A repeal of that part of the law which made the assessor and his bondsmen liable showed the intent of the legislature to be that the assessor should not be liable on his official bond as assessor for a failure to perform the duty of collecting and paying over money collected as assessor. (Sutherland on Statutory Construction; §§ 137 and 168; *White v. East Saginaw*, 6 N. W. Rep. 86.)

Henri J. Haskell, Attorney General, *Powell Black*, County Attorney, *Max Waterman* and *L. L. Callaway*, for Respondent.

The only money Gardner could receive as assessor was the

"poor tax," or as designated in the law of 1891, "poll tax." The provision in the bond requiring Gardner to account for all moneys, etc., clearly shows that it was signed by the sureties with the understanding on their part that Gardner was required and authorized by law to collect the "poor tax," and that section 1790 of the Compiled Statutes was in force and their bond enabled Gardner to collect such tax and was given for that purpose and they understood that he would account for money so received by him. As the sureties, by the conditions in the bond, recognized the existence and validity of the law requiring Gardner, as assessor, to collect the "poor tax" and undertook that he should account for money so collected, they are estopped from claiming that such law was repealed by the legislative enactment or by the constitution and not in force when the bond was given, or from claiming that the act of 1891, requiring the assessor to collect the same tax designated as "poll tax" is unconstitutional, or from claiming that Gardner, as assessor, was unauthorized to collect such tax. (*Middleton v. State* (Ind.), 23 N. E. 123; *People v. Gillespie*, 47 Ill. App. 522, 534, and cases cited therein; *Cooley on Constitutional Limitation*, page 219; *Illinois Central Ry. Co. v. King* (Miss.), 13 So. 324.) The bond given in this case is broader and more comprehensive than the bond required by the statute and its conditions require Gardner to account for all money that should come into his hands as assessor. It is of no importance whether he was required to give such a bond by law or not. Such a bond was given in this case. "It needs no statute to enable an officer to give a valid bond to perform a duty." (Sutherland on Statutory Construction, § 459.) Bondsmen are presumed to contract with knowledge of existing laws and the right of the legislature to increase the duties of their principal, if germane to his office. (*Territory v. Carson*, 7 Mont. 417; *Evans v. City of Trenton*, 24 N. J. Law 764.) The bond in suit will be presumed to have been executed in view of the statute in relation to the collection of taxes by the assessor which existed at the time it was executed. "These laws entered into and formed

a part of the contract. When a subsequent statute simply affects the duties to be performed by a public officer, not as to the kind of duties, but in their degree, no matter to what extent, the sureties upon his bond, so far as this question is concerned, will be held liable." (*United States v. Singer*, 15 Wall. 111; *People v. Vilas*, 36 N. Y. 459; *United States v. McCartney*, 1 Fed. 104.)

DE WITT, J.—In favor of the demurrer, appellants present three questions: First, that at the time the bond was executed there was no statute making it the duty of the assessor to collect the poor tax, and, if it were not the duty of his office, the bondsmen were not liable; second, that if such statute did exist at the time of making the bond, it was repealed by the act of the legislature of March 6, 1891,—a date prior to the collection and alleged embezzlement of the funds; third, that if at the time the bond was given, or the collections were made by the assessor, there was a law on the statute book making it the duty of the assessor to collect the poor tax, such a law was unconstitutional, for the reason that the constitution, in article XVI, § 5, provides that the county treasurer shall be collector of taxes. We will take up these questions in their order.

1. Gardner, the assessor, took office and filed his bond on November 8, 1889,—the day on which this state was admitted into the Union. The laws of the territory were, by the constitution, made the laws of the state, except where in conflict with the constitution. Upon the admission of the state there was upon the statute book section 1790, div. 5, Comp. St. 1887. That section provided for the levy of a poor tax of two dollars *per caput*. It made it the duty of the assessor to collect this tax in money. It provided somewhat in detail for the manner of the collection, and for the issuing of receipts, and making returns of the money and accounts. That statute also further provided that the assessor should be liable on his official bond for the nonperformance of his duties in collecting said poor tax, and for the money collected therefor by him.

Counsel contends that, while this section of the law was upon the statute book, it in fact was not a law of the territory at that time. He bases this contention upon a review of the history of the subject-matter of this section. He traces the section from 1873 down to September 14, 1887. He claims that by various amendatory and repealing acts, this section 1790 had ceased to be a law, and was by a mistake written in the compilation. We have followed counsel through the whole history of this section, and, after a careful and tedious examination, have concluded that the section was a law of the territory upon the coming in of the state. It does not seem to be profitable to recite this history, for it would not be a precedent in the future, as the question is not likely to arise again. The practice in collecting these taxes is now regulated by legislation passed in 1895. Therefore appellants' first point is not well taken.

2. By an act approved March 6, 1891, the legislature provided a new revenue law, including the matter of the poor tax, and the collection thereof by the assessor. The provisions of section 1790 of the Compiled Statutes of 1887 were practically re-enacted, except that the new law did not provide that the assessor should be liable on his official bond for the non-performance of his official duties in collecting the poor tax. As all of the collections which it is alleged this assessor embezzled were made after the passage of the act of March 6, 1891, appellants argue that there was no provision making the assessor's bond liable for his embezzlements; and furthermore that the provision of the law of 1891, requiring the assessor to collect the poor tax, was passed after the bond was given, and therefore imposed a new and different duty upon the assessor, for the performance of which the sureties had not agreed to be liable. But the act of 1891 did not impose any duty upon the assessor which was not already imposed by section 1790, *supra*, when the bond was given. Under section 1790 it was the assessor's duty to collect the poor tax, and that duty, instead of being changed by the law of 1891, was continued as it was before. The condition of the bond was that the as-

essor will render a true account of all moneys, credits, accounts and property of any kind that shall come into his hands as such officer, and pay over the same, etc. Instead of the law of 1891 imposing any new duties which were not within the contemplation of the bondsmen, it simply continued the old duties in reference to which the bondsmen had already contracted. The fact that the new law of 1891 did not state as did the section 1790 of the old law, that the bond of the assessor should be liable for the poor taxes not paid over, is not important. The law of 1891 probably omitted that clause because it was immaterial. The bond required to be given, and in fact given, as noted above, is to the effect that the assessor will pay over moneys so collected. The law requiring that such bond should be given, it would be superfluous to restate in another section of the statute the same matter theretofore provided for. We are therefore of opinion that appellants' second position is not sustainable.

3. The appellants contend that it was not the duty, and could not by statute be made the duty, of the assessor to collect the poor tax, because article XVI, section 5 of the constitution provides that in each county there shall be one treasurer, who shall be collector of taxes. But we are of opinion that the bondsmen here are estopped from questioning the constitutionality of the act of the legislature in this proceeding.

In a case similar to this, viz., *Mayor, etc., v. Harrison*, 30 N. J. Law 73, the court said: "By the condition of this bond it is recited that, whereas the said William R. Harrison had been duly appointed by the mayor and common council of the city of Hoboken as collector of assessments for street improvements, that if he should well and truly pay to the treasurer of said city all moneys which he might collect or receive as such collector, etc. By this condition the sureties have admitted that his election was by the mayor and common council, and agreed to be sureties for the payment of all moneys which, by virtue of the appointment thus made, he might receive. They are estopped from denying that Harrison was *de*

facto a collector of assessments for street improvements. Their liability to pay over what he has collected is coextensive with his. In a suit for moneys collected by him as such, neither the officer *de facto*, nor his sureties, may set up the invalidity of his appointment in bar of this action. * * * It would seem to be eminently impolitic to permit the parties to such a bond to escape its obligations by contradicting the recitals of the bond and thus retain from the public authorities the taxes received by an officer *de facto*."

This opinion is cited with approval and followed in a similar case,—*Middleton v. State*, 120 Ind. 166, 22 N. E. 123. To the same effect is *People v. Gillespie*, 47 Ill. App. 522, in which the court says: "He and his sureties cannot be heard to say that the levy was not properly made, or the tax collected without proper authority. He collected and received it by virtue of his office; and it was his duty to report and account for the same, and charge it to himself as treasurer. In *People v. Hoover*, 92 Ill. 575, it was held, when a treasurer in counties under township organization receives taxes belonging to the county, he will be considered as holding the same as collector until he reports them to the county clerk, as required by section 120 of the revenue act, and his sureties are liable. The bond of collector secures the performance of duties not covered by his bond as treasurer." See, also cases cited in that opinion. See, also, *Mayor, etc., of City of New York v. Manhattan Ry. Co.*, 143 N. Y. 1, 37 N. E. 494. *Railroad Co. v. King*, 69 Miss. 852, 13 South. 824; Cooley on Constitutional Limitation, page 181.

We are therefore of opinion that the demurrer was properly overruled, and that the judgment must therefore be affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

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KENNELLY, RESPONDENT, v. SAVAGE ET AL., APPELLANTS.

[Submitted March 10, 1896. Decided March 30, 1896.]

MARRIED WOMEN—Separate property—Conveyance—Repeal of statute.—Section 1448, Fifth Division of the Compiled Statutes, conferring upon a married woman the same right to convey her separate real estate that a married man has, being a subsequent enactment, repealed, in so far as it is repugnant thereto, section 254. *Id.*, providing that a married woman may convey her real estate by any conveyance executed and acknowledged by herself and her husband, and therefore the failure of the husband to join in a lease by the wife of her separate property does not render the conveyance void.

EVIDENCE—Writing—Impeachment.—Where, in an action on a bond, letters purporting to have been written to the plaintiff by the principal defendant are introduced by the plaintiff for the purpose of impeaching him, and the letters affected the liability of the defendant sureties, it was error to refuse to allow the sureties to prove by their principal that while the letters were signed by him, they were written by another at the suggestion of the plaintiff, and the purpose for which they were so written.

Appeal from Sixth Judicial District, Park County.

ACTION on a bond. Judgment was rendered for the plaintiff below by HENRY, J. Reversed in part.

Statement of the case by the justice delivering the opinion.

It appears from the record that the plaintiff is a married woman; that she is the owner of what is known as the "Albemarle Hotel" property in the town of Livingston, in Park county; that on the 1st day of May, 1890, plaintiff leased said property to defendant C. W. Savage for the term of three years from that date, at the yearly rental or sum of \$10,800, to be paid in advance in equal monthly installments of \$900; that the lease was in writing; that in the execution thereof the plaintiff's husband did not join; that on the 27th day of May, 1890, the defendant Savage executed his bond to the plaintiff in the sum of \$10,000, conditioned for the payment of the rent of the leased premises, and that the other defendants executed and signed said bond as the sureties of the defendant Savage; that the defendant Savage failed and neglected to pay the rents due on said leased premises in accordance with the terms of the lease.

This action is brought against the defendants on the bond to recover the amount claimed to be due from defendant Savage as rent of the premises.

The defendant Savage and his bondsmen answer separately, but all to the same effect substantially, denying that the plaintiff was the owner of the property mentioned in the complaint in her sole and separate right, and alleging that the property belongs to the plaintiff and her husband. The defendants also allege that at about the time of the execution of the lease and bond sued on defendant Savage and one E. C. Waters entered into copartnership to conduct and carry on the hotel business in the premises mentioned in the complaint under and in the firm name of C. W. Savage & Co.; that said copartnership was formed and conducted with the knowledge and consent of plaintiff, and without the knowledge and consent of the defendant bondsmen, the bondsmen contending that they were thereby released from any and all obligations on and under said bond.

The affirmative allegations of the answers are denied by the replication. The case was tried without a jury, and judgment rendered by the court in favor of the plaintiff in the sum of \$3,700. From the judgment and order refusing a new trial the defendants separately—Savage and his bondsmen—appeal.

Campbell & Stark, for Appellants.

A lease for a period longer than one year is a conveyance as contemplated by section 270, Fifth Division of the Compiled Statutes. (*Jones v. Marks*, 47 Cal. 242.) This being a conveyance of real estate, and not executed as provided in section 254, *Id.*, is void. (*Jackson v. Torrence*, 23 Pac. 695; *Nell v. Dayton*, 45 N. W. 229; *Bollinger v. Manning*, 79 Cal. 7; *Morrison v. Wilson*, 13 Cal. 495; *Landers v. Bolton*, 26 Cal. 393.) The best that can be claimed by the respondent is that section 1448 and 1450 repeal section 254 by implication. Repeals by implication are not favored. (23 Am. & Eng. Ency. of Law, 489; *United States v. Buffalo Robes*, 1

Mont. 489; *Lane v. Commissioners of Missoula County*, 6 Mont. 473.) If the lease is void no action can be maintained upon it by either the lessee or lessor to enforce its terms. The only action which could be maintained would be for the use and occupation of the premises. (*Utah Loan & Trust Co. v. Garbutt*, 23 Pac. 758; *Anderson v. Critcher*, 37 Am. Dec. 72; *Nash v. Binkam*, 83 Ind. 536; *Evans v. Winona Lumber Co.*, 16 N. W. 404; *Folsom v. Perrin*, 2 Cal. 603; *Carlton v. Williams*, 19 Pac. 185.) If the respondent and her agent knew that Waters occupied the premises as the partner of Savage and thereafter as sole tenant, this would constitute a good defense as to the sureties upon the bond, as it would make the bondsmen sureties for persons for whom they never contracted to become such. (*The Crescent Brewing Co. v. Handley*, 7 So. 912; *Bragg v. Shain*, 49 Cal. 131; *Kressing v. Alsbaugh*, 91 Cal. 233; *Miller v. Stewart*, 9 Wheat (U. S.) 704; *People's Savings Bank v. Alexander*, 21 Atl. Rep. 248; *Koenig v. Miller Bros. Brewing Co.*, 38 Mo. Ct. App. 183; *Quillen v. Arnold*, 12 Nev. 234; *Truckee Lodge v. Wood*, 14 Nev. 293.) The sureties should have been permitted to show that the letters signed by Savage and directed to respondent were in fact written by Waters at the suggestion of respondent and her agent, and signed by Savage, so that there would be no release of the sureties on the bond. If the respondent or her agent entered into any private understanding or agreement which would be to the detriment of the sureties, and so that these letters could be used in evidence against them, they should have been permitted to show the existence of these facts.

Smith & Word, for Respondent.

PEMBERTON, C. J.—The appellants contend that the lease from plaintiff to Savage was void because not acknowledged by her, and because her husband did not join with her in the execution thereof; and that, the lease being void, no action can be maintained on the bond given for the fulfillment of the terms and conditions thereof.

Counsel for appellants contend that the lease in this case is a conveyance under the provision of section 270, Division 5 of the Compiled Statutes, 1887.

Section 254, Division 5 of the Compiled Statutes, 1887, is as follows: "Section 254. A married woman may convey any of her real estate by any conveyance thereof, executed and acknowledged by herself and by her husband, and certified in the manner hereinafter provided by the proper officer taking the acknowledgment."

Counsel for appellants contend that, as the lease was not executed and acknowledged in accordance with this section by her husband joining with her in the execution thereof, it was void, and no action would lie on the bond given for the fulfillment of the terms thereof.

Since the enactment of the sections above referred to, the law in relation to the rights and powers of married women in this state has been radically changed. On the 3d day of March, 1887, an act of our legislature was approved, entitled "An act to declare and protect the legal and personal identity of married women." This act is popularly denominated "the married woman's emancipation act." On the 7th day of March, 1887, an act of our legislature was approved, entitled "An act concerning the rights of married women." Section 7 of the last act, which is section 1448, Division 5 of the Compiled Statutes, 1887, and which was in force when the lease in this case was executed, is as follows: "Section 1448. That a married woman may make contracts, oral or written, sealed or unsealed, and may waive or relinquish any right or interests in any real estate, either in person or by attorney in the same manner, to the same extent and with the like effect as a married man may do."

Statutes like ours, extending the rights and enlarging the powers of married women, have received frequent interpretation by the supreme court of Massachusetts. The supreme court of that state holds that such statutes radically change the law of the statutes relied upon by counsel for the appellants in this case. See *Harmon v. Railroad Co.* (Mass.), 42 N. E. 505, and cases cited.

We think section 1448, quoted above, confers upon a married woman the same right to convey her separate real estate, or relinquish any interest therein, that a married man has. It would not be contended that a married man cannot convey any title, interest or estate in real property he owns without his wife joining him in the execution of the conveyance, except, perhaps, the homestead. We think section 1448 repealed section 254, quoted above, and relied on by counsel for appellants, in so far as it is repugnant thereto. We think, therefore, the lease of plaintiff to Savage was not void as contended for by counsel for appellants.

The defendant bondsmen allege in their answer that E. C. Waters and defendant Savage formed a copartnership to conduct the hotel business in the leased premises under the firm name of C. W. Savage & Co., with the knowledge and consent of plaintiff, and without the knowledge and consent of said bondsmen, about the time the bond sued on was executed; and that the bondsmen were thereby released from any obligation on the bond. There was some evidence tending to support this allegation offered by the appellants on the trial. In rebuttal of such evidence, and for the purpose of impeaching the testimony of Savage and Waters, and to show knowledge on the part of the bondsmen of the existence of said firm and its occupancy of the premises, plaintiff introduced certain letters written to her by Savage. The appellants then sought to have Savage explain said letters, to show that they were written by Waters at the suggestion of plaintiff or her agent, and signed by Savage, so that there would be no release of the sureties on the bond. The court refused to permit the witness Savage to so explain, or give any explanation of the letters. Respondent's counsel, in their brief, say these letters were offered for the purpose of impeaching the witnesses Savage and Waters. If so, the witnesses had a right to explain them, and the action of the court in refusing to allow the witnesses to explain was error.

Counsel for respondent contend that it was immaterial as to who wrote the body of the letters, inasmuch as Savage signed

them, and assented to their contents. This may be true as far as defendant Savage himself is concerned. But his bondsmen contend that Waters wrote the letters at the suggestion of the plaintiff or her agent, and Savage signed them, and that the letters were so written for the purpose of concealing the connection of Waters with Savage in the hotel business in the leased premises in order not to release the bondsmen from their liability on Savage's bond. If this contention be true, then it became vitally material to the bondsmen to show the circumstances under which the letters were written, and for what purpose. These things they had a right to show, if they could, by having Savage explain why, for what purpose, and under what circumstances the letters were written.

On account of the action of the court in refusing to permit the witnesses to explain these letters, we think the judgment against the defendant bondsmen, and order refusing them a new trial, should be reversed.

The judgment against C. W. Savage, and the order of the court refusing him a new trial, are affirmed. As to all of the defendants except Savage the judgment and order appealed from is reversed, and the cause remanded for new trial.

Reversed.

DE WITT, and HUNT, JJ., concur.

NELSON, RESPONDENT, v. BIG BLACKFOOT MILLING
COMPANY, APPELLANT.

[Submitted April 3, 1896. Decided April 6, 1896.]

APPEAL—*Remitting judgment to prevent new trial.*—In an action for damages for removing timber from respondent's land where the jury returned a verdict of \$900 in two items, one for \$600, the value of the timber, and one for \$300 the damages to the land, and a new trial was directed on appeal because the appellate court was unable to determine to what extent elements upon which the proof was legally insufficient entered into the latter finding, the judgment will be modified on rehearing by reducing it \$200 upon the offer of the respondent to wholly remit that portion of the verdict.

ON REHEARING. For former report see 17 Mont. 553.

PER CURIAM.—Since the decision of this case the respondent offers to wholly remit the item of \$200 damages, and asks that after such remission the judgment be affirmed as to the item of \$600, the value of the timber cut. In the original opinion we did not fully review the testimony upon the latter point, for the reason that we felt that the judgment was clearly reversible upon the question of the \$200 item. But by respondent's voluntary desertion of the latter item, the case is left upon the \$600 verdict and judgment only. By referring to the former opinion, it will be seen that we pointed out the conflict in the testimony upon this matter, but without decidedly expressing an opinion upon its sufficiency. While the testimony as to a total damage of \$600 is not entirely satisfactory to us, still we feel that there was amply sufficient to prohibit an appellate court from holding that it was so inherently improbable as to deny it belief. The respondent's motion will therefore be granted. The judgment will be modified by reducing it \$200, and, as so modified, will be affirmed. The costs of the appeal will be equally divided between the parties.

SANFORD ET AL., RESPONDENTS, v. NEWELL ET AL.,
APPELLANTS.

[Submitted April 2, 1896. Decided April 6, 1896.]

ASSUMPSIT—Pleading—Attorneys—Answering over.—In an action by a firm of attorneys to recover for professional services, a complaint which alleges a copartnership between plaintiffs; that at a certain time they performed certain services for defendants, as attorneys, at the special instance and request of the defendants; the reasonable value of the services; and that defendants have not paid the same, is good on general demurrer, and by answering defendants waived any defects in the cause of action.

APPEAL—Amendment to pleading.—The allowance of an amendment to a pleading, not objected or accepted to at the time, will not be reviewed on appeal.

Appeal from Eleventh Judicial District, Flathead County.

ACTION for professional services. The cause was tried before DU BOSE, J. Plaintiff had judgment below. Affirmed.

Statement of the case by the justice delivering the opinion.

Action to recover for professional services. Among other matters, the complaint alleges a copartnership between the plaintiffs, Sanford & Grubb, and that "on or about the 17th day of July, 1893, the plaintiffs performed certain services for defendants as attorneys and counsellors at law, at the special instance and request of defendants." The action is to recover \$500 for such professional services rendered by plaintiffs for defendants. A general demurrer was filed to the complaint. The demurrer was overruled, and the defendants answered admitting the partnership of plaintiffs and admitting the allegations contained in the above quoted section of plaintiffs' complaint, but denied that the services were worth more than \$100, and by way of counterclaim pleaded that the plaintiffs were negligent in and about certain professional matters entrusted to them by the defendants, and that by reason of the fault, carelessness and negligence of the plaintiffs, certain amounts were lost to defendants, and as a consequence defendants were damaged to the sum of \$1,500. The replication denied all the affirmative matter of defendants' answer.

The record recites that after a jury was sworn the plaintiffs moved to amend the complaint by adding to the averment of their copartnership these words: "That these plaintiffs at all times hereinafter mentioned were, ever since have been and now are duly admitted, qualified and practicing attorneys at law in the state of Montana." The motion to amend was granted. Thereafter judgment was rendered in favor of plaintiffs, and against the defendants for the sum of \$500 and costs. The defendants appeal from the judgment.

McIntire & Clinton, for Appellants.

Logan & Brennan, for Respondents.

HUNT, J.—The complaint is good as against general demurrer. It alleges the performance of certain services as attorneys for the defendants, and that such services were performed at the special instance and request of the defendants, and that the services were reasonably worth \$500 and that defendants have not paid the same. These are allegations of fact upon which issues could be and were made. If there was uncertainty, ambiguity and unintelligibility in the allegations by omission to state in what particular direction the plaintiffs professionally served the defendants, special demurrer might have been proper. But whether special demurrer would have been well taken is not before us. By answering the defendants waived any defects of the statement in the cause of action. Authorities are unnecessary on this point.

The allowance of the amendment to the complaint was not objected or excepted to at the time leave was granted; defendants cannot complain therefore of any abuse of the discretion of the court in granting leave to amend. The judgment is affirmed.

Affirmed.

ERRATUM: The last paragraph of the foregoing opinion should read as follows: "The allowance of the amendment to the complaint is not presented for review; defendants cannot complain therefore of any abuse of the discretion of the court in granting leave to amend. The judgment is affirmed."

SANFORD ET AL., RESPONDENTS, v. NEWELL ET AL.,
APPELLANTS.

[Submitted April 2, 1896. Decided April 6, 1896.]

ASSUMPSIT—Pleading—Attorneys—Answering over.—In an action by a firm of attorneys to recover for professional services, a complaint which alleges a copartnership between plaintiffs; that at a certain time they performed certain services for defendants, as attorneys, at the special instance and request of the defendants; the reasonable value of the services; and that defendants have not paid the same, is good on general demurrer, and by answering defendants waived any defects in the cause of action.

APPEAL—Amendment to pleading.—The allowance of an amendment to a pleading, not objected or accepted to at the time, will not be reviewed on appeal.

Appeal from Eleventh Judicial District, Flathead County.

ACTION for professional services. The cause was tried before DU BOSE, J. Plaintiff had judgment below. Affirmed.

Statement of the case by the justice delivering the opinion.

Action to recover for professional services. Among other matters, the complaint alleges a copartnership between the plaintiffs, Sanford & Grubb, and that "on or about the 17th day of July, 1893, the plaintiffs performed certain services for defendants as attorneys and counsellors at law, at the special instance and request of defendants." The action is to recover \$500 for such professional services rendered by plaintiffs for defendants. A general demurrer was filed to the complaint. The demurrer was overruled, and the defendants answered admitting the partnership of plaintiffs and admitting the allegations contained in the above quoted section of plaintiffs' complaint, but denied that the services were worth more than \$100, and by way of counterclaim pleaded that the plaintiffs were negligent in and about certain professional matters entrusted to them by the defendants, and that by reason of the fault com-

The record recites that after a jury was sworn the plaintiffs moved to amend the complaint by adding to the averment of their copartnership these words: "That these plaintiffs at all times hereinafter mentioned were, ever since have been and now are duly admitted, qualified and practicing attorneys at law in the state of Montana." The motion to amend was granted. Thereafter judgment was rendered in favor of plaintiffs, and against the defendants for the sum of \$500 and costs. The defendants appeal from the judgment.

McIntire & Clinton, for Appellants.

Logan & Brennan, for Respondents.

HUNT, J.—The complaint is good as against general demurrer. It alleges the performance of certain services as attorneys for the defendants, and that such services were performed at the special instance and request of the defendants, and that the services were reasonably worth \$500 and that defendants have not paid the same. These are allegations of fact upon which issues could be and were made. If there was uncertainty, ambiguity and unintelligibility in the allegations by omission to state in what particular direction the plaintiffs professionally served the defendants, special demurrer might have been proper. But whether special demurrer would have been well taken is not before us. By answering the defendants waived any defects of the statement in the cause of action. Authorities are unnecessary on this point.

The allowance of the amendment to the complaint was not objected or excepted to at the time leave was granted; defendants cannot complain therefore of any abuse of the discretion of the court in granting leave to amend. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

STATE, APPELLANT, v. CAMP SING, RESPONDENT.

[Submitted March 31, 1896. Decided April 6, 1896.]

CONSTITUTIONAL LAW—Licenses.—The legislature has full power to enact a license law unless it is forbidden by the constitution.

SAME—Construction.—In construing a constitutional provision the proceedings and debates of the framers of the constitution may be examined as tending to show what its terms were understood to designate and include.

SAME—Same.—A constitutional provision should not be so construed as to nullify a law unless it is clear that such a construction was intended.

SAME—Laundry license tax—Construction of section 1, article XII.—The word "also" in the last sentence of section 1, article XII of the constitution, providing that "The legislative assembly may also impose a license tax both upon persons and upon corporations doing business in the state," which follows the provision that the revenue for the support of the state shall be provided for by taxes, was not used to carry over into the sentence where it occurs the idea expressed in the sentence preceding it, to the effect that the legislature may also impose license taxes for the support of the state, but was used simply to connect the idea of the two systems of revenue, and therefore the imposing of license taxes is not restricted to the purposes of state revenue alone.

SAME—Same—Construction of section 4, article XII.—A license tax is not within the inhibition of the constitution (§ 4, Article XII) that the legislative assembly shall not levy taxes upon the inhabitants or property in any county, city or town, or municipal corporation, for county, town or municipal purposes, but it may by law vest in the corporate authorities thereof powers to assess and collect taxes for such purposes. The intent of this section and section 1, *Id.*, to refer to taxation proper, and not to licenses, is expressed in the use of the words "levy," "assess," and "rate," when speaking of taxes, and the use of the word "impose," when speaking of licenses.

SAME—Laundry license tax.—The laundry license tax law (Political Code, §§ 4079 *et seq.*) which allows seventy per cent. of the licenses to be retained by the county, is not repugnant to section 4, article XII of the constitution, as levying a tax upon the inhabitants or property in a county for county purposes.

Appeal from Second Judicial District, Silver Bow County.

ACTION to recover a license fee. Judgment was rendered for the defendant below by SPEER, J., on demurrer to the complaint. Reversed.

Statement of the case by the justice delivering the opinion.

The state appeals from a judgment rendered against it upon the sustaining of defendant's demurrer to the complaint. The state brought the action to recover a license fee of \$50, alleged to be due from defendant for conducting the laundry business for six months, and also for costs and penalties amounting to \$17.

The statute under which the state claimed the license is section 4079 of the Political Code, which is as follows :

“Section 4079. Every male person engaged in the laundry business, other than the steam laundry business, must pay a license of ten dollars per quarter: provided, that where more than one person is engaged or employed or kept at work, such male person or persons shall pay a license of twenty-five dollars per quarter, which shall be the license for one place of business only.”

The contention of the defendant upon the demurrer is that this license law of the Political Code is unconstitutional and void under article XII of the constitution. The sections of that article upon which he bases his contention are Nos. 1 and 4, which are as follows :

“Section 1. The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, except that specially provided for in this article. The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state.”

“Section 4. The legislative assembly shall not levy taxes upon the inhabitants or property in any county, city or town, or municipal corporation for county, town or municipal purposes, but it may by law vest in the corporate authorities thereof powers to assess and collect taxes for such purposes.”

This license tax was imposed by the legislative assembly. (Political Code, § 4079.) Under the provisions of sections 3075 and 4050 of the Political Code, seventy per cent. of the license tax provided for is to be retained by the county, and thirty per cent. paid over to the state. The district court held that, as a portion of this license tax, to wit, seventy per cent., went to the county, the law was void under section 4, article XII of the constitution, in that the legislative assembly had thus attempted by section 4079, Political Code, to levy a tax

upon the inhabitants or property in a county for county purposes. Whether this legislation upon the question of licenses is constitutional is the question for determination of the opinion below.

Henri J. Haskell, Attorney General, *Ella Knowles Haskell*, and *Carpenter & Carpenter*, for Appellant.

I. A license tax is not a tax within the meaning of the word "taxes" in section 4 of article XII of the constitution. In the constitution are developed two separate and distinct schemes for raising revenue, to-wit: (a.) The taxation scheme. (b.) The license scheme. The license scheme is composite—formed by blending in the legislative assembly the power to license for regulation with the power to license for revenue. The constitutional scheme of taxation applies only to property (Constitution, Article XII, §§ 1, 4, 11, 12.) It will be observed from this entire taxation scheme is excepted the matter of licenses, which matter by the last sentence of section 1, is left entirely with the legislative assembly. If the license provision is mandatory, it is mandatory only in name, for there is no power in the state that can force the legislative assembly to act.

The words "assess," "levy" and "rate" as used in the above cited sections of the constitution were intended to apply to taxation upon the ownership of property, and are the apt words to indicate such application. They were not regarded by the framers of the constitution as suitable words to express the imposition of a license tax and so where a license tax is provided for in that instrument the word "impose" is used. All taxes are personal. Land is not taxed—the owner is taxed because he owns the land. The land itself does not care whether it is protected or contributes to the support of the government or not, but the owner does. In the same sense the license tax is a tax upon the person conducting a profession or occupation. "The individual, and not his property pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must

be charged." (*Green v. Craft*, 28 Miss. 70.) The tax is imposed upon the person of the owner on account of his ownership of the property. (*Rundell v. Lakey*, 40 N. Y. 517; *Everson v. City of Syracuse*, 29 Hun. 486; Burroughs on Taxation, § 7; Cooley on Taxation (2nd Ed.) page 436.) In section 4 the words "taxes upon the inhabitants or property" express a single idea, and that is a tax for revenue on account of the ownership of property. When section 4 is read in connection with the license provision of section 1, it is clear that although "taxes upon the inhabitants" and "taxes upon property" separately considered may not always mean the same thing, yet the effect of both expressions combined is to limit the restriction of section 4 to taxation of property, whether as matter of form the tax be assessed upon the property or assessed to the owner. That section should be so interpreted as simply to prohibit the legislative assembly from levying property taxes in a county for county purposes. The word "inhabitants" in said section was not intended to have a technical meaning. As used in some connections that word has a signification broad enough to include a people, a country and the property of a country. (Endlich on Statutes, § 91; *Walnut v. Wade*, 103 U. S. 693.) The section for another reason cannot apply to license taxes, as a particular provision is made for them in section 1, and the particular provision for license taxes in section 1 is to be treated as an exception to the general tax rule laid down in section 4. (Potter's Dwarrris on Statutes, page 272, 273; Endlich on Statutes, § 399.) It will further be seen that the application of the provisions of section 4 to license taxes would be an abridgement of the police powers of the state in violation of section 9 of article XV. The legislative assembly must be the unquestioned judge as to how it may properly execute the police powers of the state.

By the last sentence of section 1 of article XII, the distinction between licenses for regulation and licenses for revenue is abolished, and the entire matter of the imposition of license taxes is intrusted to the legislative assembly. The words "license tax" are to be treated as one compound word license-

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tax. That compound word may not be regarded as consisting of two undivided halves—one undivided half signifying tax for regulation, and the other meaning tax for revenue. A complete and indivisible license system is established, and this is the interpretation given to the license, revenue and taxation provisions of the constitution by the framers of that instrument. The opinions of the framers of the constitution expressed during the preparation of the instrument are of great weight in its interpretation when the meaning is not clear and obvious. (*Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 558; *Martin v. Hunter's Lessee*, 1 Wheaton 340, 352; *State of Rhode Island v. Massachusetts*, 12 Peters, 657, 721.)

The construction placed upon the constitution by the legislative assembly and by the people of Montana for the past six years has been that the Montana license law is not in violation of any Constitutional provision. Contemporaneous and legislative construction are entitled to high consideration and are controlling in doubtful cases. (Endlich on Statutes, § 357, and cases cited; Endlich on Statutes, § 527; Sutherland on Statutory Construction, § 307.) The strongest evidence that the license law has never been regarded as in violation of section 4 of article XII of the constitution consists in the fact that its constitutionality has never before been judicially disputed, and has been conceded and acquiesced in by several district courts and thrice by the supreme court—once in a case where personal liberty was involved. (*Barden v. Montana Club*, 10 Mont. 330; *State v. Raymond*, 12 Mont. 226; *State v. Owsley*, 17 Mont. 94.)

Assuming that a license tax is a tax within the meaning of section 4 article XII, the license tax upon the person conducting the laundry business was imposed by the state for its benefit. The county is merely an agency of the state in selecting the subjects for taxation and in collecting the tax. The state receives twenty-five per cent. of the license fee and permits the county to retain the remainder. It may be said that the arrangement is in the nature of a contract or of a duty imposed for compensation. Provisions in regard to taxing by

value have no application to taxing privileges. (Cooley on Taxation (2nd Ed.) page 570; *Webber v. Virginia*, 103 U. S. 350; *Webber v. Virginia*, 33 Grat. 891; *Patterson v. Kentucky*, 97 U. S. 501, 503, *People v. Russell*, 49 Mich. 617.) The requirement of a uniform rate of assessment and taxation does not apply to licenses. (*Anderson v. Kerns Draining Co.*, 14 Ind. 199, 201; *Bright v. McCullough*, 27 Ind. 223; *Thomassen v. The State*, 15 Ind. 451.) "The subject presents questions of legislative policy rather than strict law." (Cooley on Taxation (2nd Ed.) 601. "Questions of mere equity in taxation are for the legislature—not for the courts." Cooley on Taxation (2nd Ed.) 171.) "The presumption is in favor of the validity of legislation." (Cooley on Taxation (2nd Ed.) 105; Cooley on Constitutional Limitation (5th Ed.) 218.) "Legislative discretion is conclusive as to objects of taxation." (Cooley on Constitution, 343, 119.) "The question whether the principle of equity has been observed, and whether there are sufficient reasons for disregarding it, is ordinarily political and cannot be answered by the courts." (1 Hare on Constitution, 298.) The California constitution contains no provision similar to the last sentence of section 1 of Article XII and for that reason the decisions in *People v. Martin*, 60 Cal. 155 and *County of Eldorado v. Meiss*, 100 Cal. 272 are not applicable to the case at bar.

II. The license tax imposed upon defendant was authorized in the exercise of the police powers of the state. The constitution recognizes the police powers of the state, and commands that they shall never be abridged. (Constitution Article XV, § 9.) Every calling, trade or occupation through which the health, morals, comfort or good order of the people may be affected is subject to police regulation. (Prentice on Police Powers, page 12; *Webber v. Virginia*, 103 U. S. 348; *Kidd v. Pearson*, 128 U. S. 1, 26.) An ordinance prohibiting washing and ironing in public laundries and wash houses within defined territorial limits from 10 p. m. until 6 a. m. is purely a police regulation. (*Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703.) The right to im-

pose a license tax under the police power is given without section 1 of article XII, and it is again given in that section. In that section the right to license for revenue is also given. The two rights are inseparably blended, and the scheme for license taxes is absolutely removed and separated from the scheme for taxing property. So the sections in regard to levying or assessing and collecting taxes have no application to license taxes.

III. From the authorities already cited it appears that the classification of the laundry business is such as the legislative assembly had power to make. It also clearly appears that a license tax is not a tax within the meaning of section 4 of article XII of the constitution. Any charge of improper discrimination or lack of uniformity has already been fully answered by the opinion of this court in *State ex rel. Sam Toi v. French*, 17 Mont. 54.

Thomas E. Harvey, for Respondent.

Sections 4040 to 4051 and sections 4079 and 4080 of the Political Code are in conflict with and contravene the provisions of sections 1 and 4 of article XII of the constitution. By reference to this article of the constitution it will be observed that section 1 refers to state revenues; sections 2 and 3 to exemption and taxation of mining claims; section 4 is a limitation, upon the power of the legislature, in reference to revenues and the remaining sections of the article treat of other limitations of the taxing power. The rule of law is too well settled to need a citation of authorities that the whole of a section must be construed together and not separate clauses of the section. (Sutherland on Statutory Construction, page 316.) Section 1 of article XII treats solely upon "the necessary revenue for the support and maintenance of the state." It provides that "the levy" shall be "a uniform rate of assessment and taxation." The framers of the constitution anticipating and realizing that the amount of revenue which might be raised and collected by the state by this method under the

restrictions contained in section 9 of article XII, relating to the rate of taxation, might not be sufficient to meet "the necessary revenue for the support and maintenance of the state," and in the closing clause of section 1 provide "the legislative assembly may also impose a license tax upon persons and corporations doing business in the state." Different sentences in the same section are to be referred respectively to other sentences to which they relate. (Endlich on Statutes, page 585.) And this last clause of section 1, by the use of the word *also*, refers to the sentence preceding. The word *also* takes the place of the words "for the support and maintenance of the state if they deem it necessary." "The whole law-making power of the state," which is not expressly or impliedly withheld by the constitution, is committed to the legislature. They have unlimited power in regard to legislation, except where restrained by the written constitutions. (Cooley on Constitutional Limitations, page 105, and numerous authorities cited therein.) The legislative assembly, were this clause eliminated from the constitution, would have authority to "impose a license tax upon persons and corporations doing business in the state," for there is no restriction upon the authority of the legislative assembly unless one is imposed in the constitution. (Cooley on Taxation, page 570; Desty on Taxation, vol. 1, page 302; *City of Newton v. Atchinson*, 3 Am. & Eng. Corp. Cases, 447.) The last clause of section 1 of article XII was unnecessary for the purpose of conferring authority upon the legislative assembly.

To determine the meaning of the language used in section 4 of article XII, we need only reach a conclusion of the meaning of the word *taxes* as used in this section. Section 4 is a limitation upon the power of the legislative assembly. After providing for the revenue necessary for the state, article XII then proceeds, in section 4, to place a limitation upon the legislative assembly. The word *tax* means a burden-charge imposed upon persons or property to raise money for public purposes. (1 Desty on Taxation, page 1; Cooley on Taxation, page 1.) Is a license or license fee a tax as provided in the

sections of the Political Code under which the action is sought to be maintained? "A license fee is a tax sometimes, and for some purposes, it is not a tax." (*State ex rel. Sam Foi v. French*, 17 Mont. 57.) Licenses are levied for two purposes: First, for revenue; second, for regulation, and are sustainable on either or both grounds. (Cooley on Taxation, page 572.) License fees are taxes and means of exercising the taxing power of the state when revenue is the main purpose for which they are imposed. (1 Desty on Taxation, page 305; Cooley on Taxation, page 572; Cooley on Constitutional Limitations, pp. 201, 611; Dillon on Municipal Corporations, § 93, 609; *Santa Barbara v. Stearns*, 51 Cal. 499; *People v. Martin*, 60 Cal. 153; *County of Eldorado v. Meiss*, 100 Cal. 272; *State v. Moore*, 18 S. E. Rep. 342; *People v. Naglee*, 52 Am. Dec. (note), page 331; *Hynes v. Briggs*, 29 Am. & Eng. Corp. Cases 561; *Ward v. Maryland*, 12 Wall. 418; *Mayer v. Roth*, 29 La. Ann., 261; *Parish v. Levy*, 23 Am. & Eng. Corp. Cases 587.) Section 1 of article XII designates these charges as a license tax. Every section of the Political Code so designates the charges sought to be collected. Section 1 of article XII uses the language "impose a license tax." The verb used is *impose*. The principal word is *tax* and the term *license* simply qualifies and describes it. To say that the words "license tax" are to be treated as the compound word, license-tax, is to violate all rules of grammatical construction, and contrary to the decisions and definitions of the terms as given by the courts. Assume that appellant's position, that the words "license tax" should be treated as a compound word, to be correct, then apply the well known rule of grammatical construction, viz: That where a compound word is composed of two nouns, the first is to be considered a qualification of the second. For the purpose of obtaining a proper construction of the last clause of section 1 article XII, the application of this rule bears out respondent's position, that the word *license* is descriptive of and qualifies the word *tax*. (*City of Newton v. Atchison*, 3 Am. & Eng. Corp. 452.)

DE WITT, J.—Does section 4 of Article XII of the consti-

tution prohibit the legislature from passing a law such as section 4079, Political Code of 1895, imposing a license tax upon persons and corporations doing business in the state, when part of the proceeds of such license tax goes to the county; and can such license tax be imposed only by the county, which is part recipient of the funds collected in pursuance of such statute? This important question could have been reached in the case of *State ex rel. Sam Toi v. French*, 17 Mont. 54. It was within our contemplation at the time of writing that opinion, but the question was not mentioned or argued by counsel, and was therefore reserved. It has since engaged the attention of several of the district courts, and of many of the most distinguished members of the bar in the state. The result is that it has been thoroughly briefed and argued at this time by eminent counsel on both sides.

We are sensible of current affairs about us, and cannot but be aware that declaring section 4079, Political Code, to be unconstitutional, is the losing, for a considerable period of time, of an immense revenue; but we are obliged to close our minds to such considerations. As Mr. Justice Hunt said in *State v. Mitchell*, 17 Mont. 67: "It were far better at this time, in the early history of this new state, that a legislative act be declared invalid than that precedent be set by which plain provisions of the constitution be nullified by loose and questionable interpretations of our fundamental law. (*State ex rel Woods v. Tooker*, 15 Mont. 8.)

And in the matter before us it is better that we suffer all the inconveniences of a present loss of revenue than that we let go of the constitution for the sake of relief from temporary distresses. The argument *ab inconvenienti* must be excluded from all control over the decision.

But, on the other hand, we must keep in mind another rule of constitutional construction. Judge Cooley, in his *Constitutional Limitations*, said, in speaking of Chief Justice Shaw: "It has been said by an eminent jurist that when courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give

it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject; and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained." (Cooley on Constitutional Limitations, 182.)

Judge Cooley also quotes the following from Chief Justice Marshall in *Fletcher v. Peck*, 6 Cranch. 128 : "The question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

He quotes further from Mr. Justice Washington, as follows: "But if I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the constitution is proved beyond all reasonable doubt." See, also, Endlich on Interpretation of Statute, § 178.

Therefore, with these principles before us, and deeply sensible of the importance to the state of this decision, we approach its consideration with the sentiment that we must be at least fairly satisfied of the unconstitutionality of the license law before we so declare it.

The legislature has full power to enact a license law, unless it is forbidden by the constitution. In the case of *State v. French, supra*, after stating the common learning as to the difference between the constitution of a state and that of the United States, we said: "A state legislature is not acting under enumerated or granted powers, but rather under inherent powers, restricted only by the provisions of this sovereign constitution. We therefore inquire whether our constitution restrains the legislature from enacting such a law as sections 4079, 4080, Political Code." We make the same inquiry now.

Article XII of the constitution treats the subject of revenue and taxation. As observed by both counsel in this case, this article provides two systems of raising money. Without intending to be now wholly technical in the use of words, we may describe them as (1) the taxation system, and (2) the license system. We use these terms now simply for convenience, and not as an expression of an opinion in advance as to whether this license is a tax or not. If the legislature sees fit, all revenues may be raised by taxation. Taxation is the security for the debts and expenses. The license system is a further provision. As exigencies arise, or do not arise, or cease to exist, the license system may be, or need not be, resorted to. That system is elastic and pliable, and can be suited to circumstances.

The important question in this case is, what restraint, if any, is placed upon the legislature in creating a license system? Before examining this question, we will notice that which appears in contrast; that is to say, the restrictions which are placed upon the power of the legislature as to taxation. They are very many. They are an inheritance of our history. We will review some of them. The rate of assessment and taxation shall be uniform, under such regulations as secure a just valuation for taxation of all property, etc. (Article XII, § 1.) Liberal exemptions are provided for. (*Id.*, § 2.) Mines and mining claims in the state are liberally protected from what might be, perhaps, deemed excessive taxation. (*Id.*, §

3.) The valuation of the property for taxation for any town and school purposes shall not be greater than the valuation for state and county purposes. (*Id.*, § 5.) The taking of private property for corporate debts of public corporations is guarded against. (*Id.*, § 8.) Provision is made for maximum rate of taxation for state purposes. (*Id.*, § 9.) All state taxes shall be paid into the state treasury, and shall not be drawn out but in pursuance of specific appropriations made by law. (*Id.*, § 10.) Taxes shall be levied and collected by general laws and for public purposes only, and shall be uniform upon the same class of subjects, within the limits of the authority levying the tax. (*Id.*, § 11.) It does not seem necessary to go further in citing the limitations put upon the power of taxation. The whole of Article XII treats this subject of limitation with great care. In almost every section can be found prohibitions or limitations upon the legislative power as to taxation.

But the license system of raising revenue and license taxes are mentioned by name in only one place in the constitution. That is the last sentence of section 1, which says: "The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in this state." With that utterance the constitution leaves the subject; that is, as far as any direct language is to be found. The license tax is not even controlled by the equality and uniformity requirements of the constitution. (*State v. French, supra.*)

But, while the question of license taxes is not mentioned, in terms, elsewhere in the constitution, the defendant has presented a very able argument to the effect that the last sentence of section 1, Article XII, and also section 4, while not so providing in direct language, must be read and interpreted to the effect that the legislature is indeed prohibited from imposing a license tax, the proceeds of which, or part of the proceeds, are to go to the county. His first argument is found in the use of the word "also" in the last sentence of section 1. He contends that the word carries over into the sentence where it occurs the idea expressed in the sentence which precedes it. That is to say, that when the section says that the legislative

assembly may *also* impose a license tax, etc., it means that it may also impose such license tax for the support and maintenance of the state; and therefore that it cannot be imposed by the legislature partly for the support and maintenance of a county. But we do not think that the word "also" necessarily or reasonably has such meaning. It appears to us to be nothing more than a conjunctive, perhaps connecting the two sentences. It has about the same significance as "furthermore." Webster's International Dictionary gives the following definitions of the word "also:" "In addition; besides; as well; further; too. 'Lay up for yourselves treasures in heaven; * * * for where your treasure is, there will your heart be also.' Matthew vi., 20, 21." The Century Dictionary gives these definitions: "In like manner; likewise; in addition; too; further. 'In fact, Mr. Emerson himself, besides being a poet and a philosopher, was also a plain Concord citizen.' Holmes on Emerson. 'This ye knowen also well as I.' Chaucer's Canterbury Tales." The simple reading of the whole section, to our minds, is that "the necessary revenue for the support and maintenance of the state shall be provided," etc., "and, in addition to this, and furthermore, the legislature may impose a license tax," etc. The use of the word "also" is to simply connect the ideas of the two systems of revenue mentioned in the section. It introduces the creation of the second system, to wit, the license system. In this sentence the license system first appears, and the sense of the whole section is simply that "there shall be the taxation system, and, furthermore, or also, the license system." Any common illustration of the use of the word "also," as employed in daily life, demonstrates that it does not carry over into the sentence where it is used all of the ideas expressed in the preceding sentence. One may say: "This morning I shall go to the statehouse for the purpose of arguing a case before the supreme court. I shall also stop at the county courthouse." The word "also" by no means conveys the idea that the speaker intends to stop at the latter place for the same purpose which called him to the former.

We are of opinion there is no real merit in defendant's contention as to the use of this word "also."

Therefore, having passed this branch of the contention, there are no such limitations upon the power of the legislature as are contended for by the defendant, unless they are found in section 4 of Article XII. We will examine that section in a moment. We pause at this point to suggest another matter, and that is, to examine the opinions of the framers of the constitution, which they recorded during the preparation of this article XII. Such opinions may be examined as tending to show the intention. This was done in *Pollock v. Trust Co.*, 157 U. S. 429, 15 Sup. Ct. 673, popularly known as the "Income Tax Case," in which Mr. Chief Justice Fuller said: "We inquire, therefore, what, at the time the constitution was framed and adopted, were recognized as direct taxes? What did those who framed and adopted it understand the terms to designate and include?" The learned Chief Justice then went into an extensive examination of the history of the country, and the debates in the constitutional convention of the United States.

We have consulted the proceedings and debates of the constitutional convention of this state at page 1325 *et seq.*, as filed in the office of the secretary of state. There was an earnest debate over section 1, Article XII, and many opinions were forcibly expressed that the state should not adopt a license system at all. It was also proposed to amend the last sentence of section 1, Article XII, to read as follows: "The legislative assembly may also impose a license tax for the regulation of the sale of intoxicating liquors and other occupations requiring police supervision, both upon persons and upon corporations doing business in the state, and no license shall be imposed for any other purpose." The proposed amendment was defeated. The last member who spoke upon the question was the Honorable T. E. Collins, chairman of the committee on finance, and who was also chairman of the same committee in the old constitutional convention of 1884. He said that it would be safe to leave this matter to the legislative assembly.

The sentiment of the convention was to this effect. So, instead of putting restrictions upon the power of the legislature as to licenses, as was done as to taxes, the constitutional convention deliberately, and after earnest debate and consideration declined to do so.

Therefore, with all the evidence, both intrinsic and extrinsic, that the constitution intended to and did carefully limit the legislative power as to taxation, and the total lack of evidence that it was the intention to so limit legislation upon the subject of licenses, may the language of section 4 be construed as a prohibition upon the legislature to impose a license tax for county purposes?

In the first place, if section 4 is such a prohibition, then there seems to us to exist a repugnancy between that section and the last sentence of section 1. The latter says broadly that the legislature may impose a license tax upon persons and corporations, etc. There is no qualification upon this power found in section 1. The power, as we have above construed section 1, is not in that section confined to imposing the license tax for state purposes only. This unlimited power being given directly by section 1, and deliberately, as the debates show, then, if we are to find it afterwards limited by section 4, the words of section 4 to such effect should be clear. (Cooley on Constitutional Limitations, above cited.) We do not think it is clear, and we will point out the reasons for such opinion.

Of course, if the words "levy taxes," used in section 4, mean "license taxes," then the prohibition contended for by the defendant exists; and if those words do not mean "license taxes," the prohibition does not exist. In either event it is, in our opinion, immaterial whether the license tax is for regulation or for revenue, and the distinction in license fees, as to whether they are for regulation or for revenue, is not important in the case. Even if the license tax be for revenue (which it probably is,) and if it should, therefore, be construed to be a tax as that term is used in the cases distinguishing between a tax and a license fee for regulation, it is, in any event, a license tax provided for by the constitution, whether

imposed for either purpose. It is therefore constitutional for either purpose, unless, of course, license taxes were within the contemplation of the framers when they used the words "levy taxes" and "assess and collect taxes" in section 4. The use of several words in Article XII is, to our mind, important. The article, in speaking of ordinary taxation and taxes, uses the words "levy," "assess," and "rate." In the only place in the article where license tax is mentioned, the word is "impose." The former words were apt in speaking of taxes, and the latter in our opinion, is appropriate in describing licenses. As to the words "assess," "rate," and "levy," we note the following definition from standard dictionaries:

"Assess: Taxes in respect of land and houses are calculated with reference to the estimated value of property, which is arrived at by a process called 'assessment.'" (Rap. & L. Law Dict.)

"Assess: (2) To adjust or fix the proportion of a tax which each person liable to it has to pay; to apportion a tax among several; to distribute a taxation in a proportion founded on the proportion of burden and benefit. (3) To place a valuation upon property for the purpose of apportioning a tax." (Black, Law Dict.)

"Assess: To set, fix, or charge a certain sum upon, by way of tax; as to assess each individual in due proportion." (Cent. Dict.)

"Assess: (1) To rate or fix the proportion which each person is to pay of a tax; to tax; to adjust the shares of a contribution by several persons towards a common object, according to the benefit received; to fix the value or the amount of a thing; to determine by rules of law a sum to be paid; to rate the proportional contribution due to a fund; to fix the amount payable by a person or persons in satisfaction of an established demand." (And. Law Dict.)

"Rate: It sometimes occurs in a connection which gives it a meaning synonymous with 'assessment'; that is the apportionment of a tax among the whole number of persons who are responsible for it, by estimating the value of the taxable prop-

erty of each, and making a proportional distribution of the whole amount. Thus we speak of 'rating' persons and property." (Black, Law Dict.)

"Rate: A sum assessed as a tax; in England, a local tax; as the county, the borough, the poor rate. May apply to the percentage of taxation, or to the valuation of the property." (And. Law Dict.)

"Ratable: 'Ratable estate,' within the meaning of a tax law, is a taxable estate." (And. Law Dict.)

"Levy: To raise, execute, exact, collect, gather, take up, seize. Thus, to levy (raise or collect) a tax; to levy (raise or set up) a nuisance; to levy (acknowledge) a fine, to levy (inaugurate) war; to levy and execute,—i. e. to levy or collect a sum of money on an execution." (Black, Law Dict.)

"Levy: (Law) (1) To seize or take (property) by virtue of a judicial writ thereunto commanding. (2) To impose or assess (a tax) on property, and collect it under authority of law." (Stand. Dict.)

These definitions all carry the popular understanding of the words. They are appropriately used when speaking of taxation, and, we believe, with the scholarship, learning, and ability which were present in the constitutional convention, they were deliberately used. They involve the ascertaining of values and fixing taxes in proportion thereto, and are used all through article XII, in regard to taxes and taxation. See sections of the article. But none of these words are used in the last sentence of section 1, Article XII, where the license tax is provided for. There the word is "impose." That word is derived from the Latin word "*imponere*," meaning literally "to lay upon." Therefore we find throughout the whole of article XII distinctive words used in speaking of the taxation system and the license system. Then we come to section 4, which defendant claims refers to licenses. There the words are "levy" and "assess,"—the same words always applied in the article to the subject of taxation strictly. "Impose," the word adopted in treating of license taxes, is not used. It is deliberately omitted from section 4. Before the

constitution was finally adopted, a committee was appointed, and acted upon the subject of "revision and phraseology." Therefore, with all the debate in the convention, and with a final technical and literary revision of the constitution, we are of opinion that the use of the words "assess," "levy," and "rate" as to the one subject, and "impose" as to the others, is significant. Such words seem to express an intent that section 4 should refer to taxation strictly and not to licenses. In any event, it is by no means clear to us that the intent of section 4 was to refer to licenses; and, if the intent is not clear, we cannot put such construction upon it as will nullify the law under consideration. (Cooley on Constitutional Limitations, above quoted.)

Great importance is attached by the defendant to the case of *People v. Martin*, 60 Cal. 153, and that case is claimed by him to be applicable to the question now before us. The section of the constitution of California which it is urged is practically the same as our section 4, Article XII, is section 12, Article XI. It reads as follows: "Section 12. The legislature shall have no power to impose taxes upon counties, cities, towns or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

The case of *People v. Martin* was an action to recover a license tax by reason of the defendant carrying on the business of selling goods. It was brought under section 3360 of the Political Code of California, which was a portion of the license law enacted by the legislature of California before the adoption of the present constitution of that state. The California court held that said license law was unconstitutional, by reason of section 12, Article XI, of the constitution. Mr. Justice Ross, in delivering the opinion, said: "The important question in this case is whether or not the word 'taxes,' as used in this section of the constitution, includes license taxes; for, if it does, the provisions of the Political Code imposing and

providing for the collection of the license tax here in question are clearly inconsistent with this section of the constitution, and therefore inoperative by virtue of section 1 of Article XXII of the same instrument. That the license fees imposed by the provisions of the Political Code were imposed mainly, if not solely, for the purposes of revenue, does not admit of doubt; and, where that is the case, they are, in effect, taxes. (Cooley on Taxation, pp. 396, 397; 2 Dillon on Municipal Corporations, § 768.) Indeed, the statute itself designates the charge as a license tax. (Political Code, § 3359.)

But are they 'taxes' within the meaning of section 12 of Article XI of the constitution? We are of the opinion that they are. It is clear that that section is not limited to taxes upon property, for by its express language the legislature is prohibited from imposing taxes upon the inhabitants of counties, cities, towns or other public or municipal corporations, as well as upon their property, for city, county, town or other municipal purposes. The defendant is an inhabitant of the county of Santa Cruz, engaged in the business of selling goods, wares, and merchandise. The tax imposed upon him, and which it is proposed to collect, was undoubtedly imposed for county purposes; for, as already observed, the statute authorizing it required the tax, when collected, to be paid into the county treasury for the use of the county general fund. The power to impose such taxes for such purposes, in our opinion, no longer remains with the legislature; but the constitution expressly gives it the power, by general laws, to vest in the corporate authorities of the counties, cities, towns or other public or municipal corporations, the power to assess and collect taxes for those purposes."

But the important distinction between the California constitution and ours, and the California decision and that which we intend to make, is that there is wholly absent from the California constitution a provision like the last sentence in section 1, Article XII, viz: "The legislative assembly may also impose a license tax, both upon persons and upon corporations doing business in the state." This sentence we have endeav-

ored to construe above, and the construction which we place upon it, and the fact of its absence from the California constitution, render, in our opinion, the California decision inapplicable. Further than that, the California decision was not thoroughly considered, and was delivered by a divided court. The California constitution upon the subject of revenue made no such distinctions between the words "impose," "levy," "assess" and "rate" as we find to be clearly made in the constitution of Montana. It did not, as does ours, specially apply the one word to license taxes, and use the other words in referring to taxation strictly speaking. It cannot be argued that the prohibitory section in our constitution is borrowed from California, because, by comparing the language of the two, it is seen that they are different. See the two sections above quoted. The California prohibitory section uses the word "impose;" ours uses the word "levy." But the great distinction between the two constitutions, and the question of prohibition as contained in them, is in that last sentence of section 1 of our Article XII, which we have heretofore fully discussed.

Furthermore, much is made by the defendant of the use of the word "inhabitants" in our section 4. He argues that when the section says, "shall not levy taxes upon the inhabitants or property," the word "inhabitants" means "persons." The same word is used in the California constitution, and the decision of *People v. Martin* turns largely upon that word. (See citations from that case, *supra*.) Defendant's contention is that the word "inhabitants" means "persons," as distinguished from property, and that section 4 contains both words, viz.: "inhabitants" and "property," and therefore the prohibition is on both, as to levying taxes upon property and upon persons; and that the only kind of tax which could be levied upon persons would be the license tax, which is personal, while the tax upon property is not personal; and that, therefore, the use of the word "inhabitants" can mean nothing but a prohibition against the legislature levying the only kind of a personal tax, which is a license tax. This

argument cannot be maintained, for this reason: that the distinction which the defendant seeks to make as to levying or assessing or imposing taxes upon persons or property is more apparent than real, if, indeed, it is even apparent. The words "persons" and "property" are sometimes used indiscriminately, even in instruments of the gravest importance and dignity. But the fact is that all taxes are levied upon persons, and not upon property. It is the person that is taxed or licensed. In case of taxation, strictly speaking, the property which the person owns is used to determine the amount of the tax which he shall pay; but it is the person who, after all, pays the tax, and not the property. The person is liable, and the property, in addition to being the means of determining what the person shall pay, is also a security for its payment.

Upon this subject Judge Grover, of New York, said in *Rundell v. Lakey*: "It is, I think, apparent from the various provisions of the statute, that in respect to both real and personal property owned by a resident of the town or ward where the former is situated, the tax is imposed upon the person of such owner on account of the ownership of such property, and his liability to such tax is conclusively fixed by the completion and delivery of the roll. The counsel for the appellants concedes that this is true as to personal property. I can see no substantial reason for a distinction between an assessment for real or personal property against an individual. Both are alike assessed to the owner. The tax is in both cases imposed upon the owner. Provision is made in both for the collection of the tax from the property of the owner by the collector of the town or ward." (40 N. Y. 516.)

It was also said in *Everson v. City of Syracuse*, 29 Hun. 486, by Judge Haight, then of the supreme court, and now of the court of appeals, in referring to *Rundell v. Lakey*, *supra*: "In that case the conveyance was made after the assessment, and before the tax was levied. The question was as to which of the parties was liable for the tax, the grantor or grantee. It was in that case held that the collector was not only authorized, but it was his duty, to collect the tax, if not otherwise

paid, by seizing and selling the goods of the person against whom the tax has been assessed, or any goods in his possession; that the person against whom the tax was assessed was primarily liable; that the tax levied is not a tax imposed upon the land, but that it is imposed upon the person on account of his ownership of the land, and that he is primarily liable for the payment of it; that the tax when levied, simply becomes a lien upon the land."

We take the following from *Green v. Craft*, 28 Miss. 70 : "The term 'taxes,' it is said, 'includes all contributions imposed by the government upon individuals for the service of the state.' The individual, and not his property, pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged, and for the purpose of enforcing payment, when the owner shall be legally in default in paying at the time stipulated by law." (See, also, *Cooley on Taxation* (2nd Ed.) page 476.)

It, therefore, being true that it is the person that is taxed, there seems to be no particular significance in the use of the two words "inhabitants" and "property" in section 4, Article XII, of the constitution. While these two words are used, the subject matter is the same. And if the section refers, as we have endeavored to show that it does, to taxation of property, it was not important that the section uses the words "inhabitants" as well as "property," for the result is the same, and the taxation referred to meant a property tax; that is to say, a tax upon a person, levied upon the basis of the property owned by him.

Another argument in favor of the view that it was the intention of the constitution to commit the subject of license taxes to the legislature may perhaps be found in the fact of legislative construction. Ever since the adoption of the constitution, the legislature, either by allowing old laws to remain upon the statute books, or by enacting new ones, has recognized the principle that the subject of license taxes is for the legislature. The business of the state has been conducted

upon this principle during its whole history. We mention this matter, not as of great importance, but as entitled to some slight consideration. As noted by Judge Cooley in the citations from eminent jurists given in the earlier part of this opinion, it is not upon slight or doubtful considerations that a court will declare that the legislature has disobeyed the constitution.

Another matter of slight importance, but tending in the same direction, is the fact that this license system has been in this court several times, and, while the question of its constitutionality has never been raised in any way, three decisions have been made which recognize it as a portion of the body of the state law, viz: (*Barden v. Club*, 10 Mont. 330; *State v. Raymond*, 12 Mont. 226; *State v. Owsley*, 17 Mont. 94.) All of those cases were presented by very able counsel, and any one of them could have been determined upon the alleged unconstitutionality of the license-tax law, if the question had been raised. We do not, however, present this matter as one of any particular weight, for it is not entitled to such consideration.

There are a few other matters which have been mentioned as reasons for sustaining the demurrer to this complaint. But little has been made of them by counsel, and we do not think even the respondent regarded them as important. We think the additional points so made are not well taken, but will not discuss them. The great question in the case, and that upon which both counsel rested their whole contention, is the constitutional matter which we have decided. That matter, after mature deliberation, we consider clear. Furthermore, we consider it absolutely clear that the unconstitutionality of the law in question is not so apparent as to justify this court in declaring the license law void. The judgment of the district court is reversed, and the case is remanded, with directions to overrule the demurrer, and proceed with the case.

Reversed.

PEMBERTON, C. J., and HUNT, J., concur.

BERKIN, APPELLANT, v. MARSH ET AL., RESPONDENTS.

[Submitted April 6, 1896. Decided April 13, 1896.]

GUARDIAN—Limitation of action against sureties—Death of ward.—The death of a ward is a discharge of the guardian within the meaning of section 404, of the Probate Practice act (1887), providing that an action against the sureties on a guardian's bond must be commenced within three years from the discharge or removal of the guardian.

SAME—Action against sureties—Legal disability.—A legal disability to sue pertains to the person desiring to sue and not to the cause of action, and therefore, though a cause of action on a guardian's bond may not accrue until after the guardian's final accounting, this does not place the administrator of a deceased ward under a disability from the time of the ward's death until the accounting, within section 404 of the Probate Practice act (1887), limiting actions against a guardian's sureties to three years from the discharge of the guardian, unless the person entitled to bring the action is under a legal disability to sue.

SAME—Limitation of action against.—The provision of section 404, Probate Practice act (1887) requiring action against the sureties on a guardian's bond to be brought within three years, is a special statute of limitations for the benefit of the sureties, and not for the principal.

Appeal from Fifth Judicial District, Jefferson County.

ACTION in guardian's bond. Judgment was rendered for the defendants below by SHOWER, J., on demurrer to the complaint. Reversed in part.

Statement of the case by the justice delivering the opinion.

Plaintiff appeals from a judgment entered upon sustaining the defendant's demurrer to the complaint. Plaintiff is administrator of the estate of Valentine Thuma, who was judicially declared to be dead on October 11, 1890, on which day plaintiff was appointed administrator of his estate. Thuma, before his death, was insane, and the defendant Marsh was for many years his guardian. Marsh made his final accounting on April 10, 1891, which was confirmed in court May 2, 1891. Upon the death of Thuma, and upon the accounting of Marsh it appeared that Marsh had assets in his hands, belonging to his former ward, amounting to \$10,633.49. He was directed by the court to pay this sum to the administrator, this plaintiff. The complaint alleges all of these facts, and, furthermore, that there is still in the hands of Marsh, the former

guardian, the sum of \$9,585.58. This action to recover this sum was commenced against Marsh and his sureties on March 8, 1894. The demurer of all the defendants was upon the ground that the cause of action was barred by section 404 of the probate practice act, in force at the time these proceedings were had. The section reads as follows:

“Section 404. No action can be maintained against the sureties on any bond given by a guardian unless it be commenced within three years from the discharge or removal of the guardian; but if at the time of the discharge or removal of the guardian the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within three years after such disability is removed.”

From October 11, 1890, the date of the death of the ward and of the appointing of the administrator, the plaintiff, up to the time of the commencement of the action, more than three years elapsed. From May 2, 1891, the date of the guardian's accounting, up to the commencement of the action, less than three years elapsed. The action was against the guardian and the sureties on his bond. Both the guardian and the sureties joined in the demurrer to the complaint. The demurrer was sustained on the ground that the cause of action was barred by the statute of limitation found in section 404, *supra*.

Cowan & Parker, and Thomas J. Galbraith, for Appellant.

I. The statutes in question did not commence to run until after the rendering of, and adjudication upon, the guardian's final account, and no *discharge* in contemplation of law could have taken place until such time. (*Davis v. Drew*, 25 Am. Dec. 467; *Commonwealth v. Stub*, 51 Am. Dec. 515 and notes; *Commonwealth v. Moltz*, 51 Am. Dec. 499 and notes; *Irwin v. Backus*, 25 Cal. 214; *Graff v. Misoner*, 52 Cal. 636; *Allen v. Tiffany*, 53 Cal. 16; *Bisbee v. Gleason*, 32 N. W. 578, (Neb.); *Tudhope v. Potts*, 51 N. W. 1110, (Mich.); *Bell v. Rudolph*, 12 So. 153, (Miss.); *Marlow v. Lacy*, 2 S.

W. 52, (Texas); 9 Am. & Eng. Ency. of Law, page 135, and cases cited in note 3; *Douglas v. Ferris*, 18 N. Y. S. 685; *Brandt on Suretyship*, § 491, 494; *Brodrrib v. Brodrrib*, 56 Cal. 563.)

II. The plaintiff was under a legal disability to sue, pending the action or proceeding for accounting. (*Irwin v. Backus*, 25 Cal. 214; *Montgomery v. Hernandez*, 12 Wheaton 129, and cases cited; *Mattingly v. Boyd*, 20 Howard, 128; *Nell v. Commonwealth*, 7 A. 74; *North Star v. Strong*, 33 Minn. 1; *Bell's Appeal*, 115 Pa. St. 88; 9 Am. & Eng. Ency. of Law, 135 and notes; 13 Am. & Eng. Ency. of Law, 731 to 745 inclusive and note 4 on page 746, citing *Chicago v. Jenkins*, 103 Ill. 588 to 597; 24 Am. & Eng. Ency. of Law, 864.)

Edward C. Russel, for Respondents.

I. The death of the ward makes guardianship of the ward no longer necessary, and it has been frequently held, that the office of the guardian, as to the property, after the death of the ward, was simply that of a custodian, with the one duty to turn over the assets at once to the person or persons entitled to receive them. (Lawson's Rights, Remedies and Practice, Vol. 11, 859. Schouler on Domestic Relations, 312; Am. & Eng. Enc. of Law, Vol. IX, page 96 and cases cited; *Kimball v. Perkins*, 130 Mass. 141; *Martin v. Tally*, 72 Ala. 23.) The death of the ward is a more definite termination of the guardianship than the coming of age, which is universally held to be a termination of the guardianship. (*Henderson v. Henderson*, 54 Md., 343; *Green v. Johnson*, 2 Gill & J. 389; Angell on Limitations, § 178; *Williams v. McNaire*, 98 N. C. 334; *Hodges v. Council*, 86 N. C. 184; *Glass v. Wolf*, 3 So. (Ala.), 11.)

The death of the ward is a "discharge" of the guardian, from which time the statute begins to run. (*Loring v. Allen*, 9 Cush. 68; *McKimm v. Mann*, 141 Mass. 507; see also, *Probate Judge v. Stevenson*, 55 Mich. 320; *Hudson v. Bishop*, 32 Fed. 519; affirmed in 35 Fed. 820; *Probate Court v. Childs*, 51 Vt. 82.)

II. Appellant's claim that the administrator was under a legal disability to sue, is not tenable. These words, "legal disability," have a technical meaning when used in connection with statutes of limitation, and it has been frequently held, by the best authorities, that the statutory exceptions, expressly mentioned, are the only exceptions to such statutes which will be considered by the courts. (Wood on Limitations, § 252; *Chemical National Bank v. Kissane*, 32 Fed. 429; *Demarest v. Wyncoop*, 3 Johnson's Ch. 142; *Amy v. Watertown*, 120 U. S. 320; Angell on Limitations, 203; *McIver v. Rogan*, 2 Wheat. 25; *Fairbanks v. Long*, 91 Mo. 628; *Dozier v. Ellis*, 28 Miss. 730; *Rowell v. Patterson*, 76 Me. 196; *Bucklin v. Ford*, 5 Barb. 393.)

DE WITT, J. This is a special statute of limitations, applied to sureties upon a guardian's bond. (*Hudson v. Bishop*, 32 Fed. 519.) Appellant contends that the cause of action here attempted to be stated arose only upon the filing of the final report by the guardian, and its confirmation by the court. It is not necessary to express an opinion upon this question. It may be conceded for the purposes of this decision that the cause of action arose only upon the confirmation of the guardian's final report. Upon this question see *Chaquette v. Ortet*, 60 Cal. 594; *Hood v. Hood*, 85 N. Y. 561; *Marlow v. Lacy*, 68 Tex. 154, 2 S. W. 52; *Perkins v. Stimmell*, 114 N. Y. 359, 21 N. E. 729. But as above noted, this statute of limitations is a special one. The time does not, as in ordinary statutes of limitation, commence to run at the accruing of the cause, of action. On the other hand it commences at the date of the discharge or removal of the guardian. In this respect the statute is specific. The inquiry, then, is, when was this guardian removed or discharged?

Upon a similar statute Chief Justice Shaw of Massachusetts said: "The defense relied on, by a surety on a guardianship bond to the judge of probate, is that it is barred by the statute of limitation. The provision in Rev. St. C. 79, § 26,

is, 'that no action shall be maintained against the sureties in any bond given by a guardian unless it be commenced within four years from the time within which this chapter shall take effect, or within four years from the time when the guardian shall be discharged,' with a proviso not material. The court are of opinion that by the term 'discharged,' in this statute, is intended any mode by which the guardianship is effectually determined and brought to a close, either by the removal, resignation or death of the guardian, the marriage of a female, the arrival of a minor ward to the age of twenty-one, or otherwise." (*Loring v. Alline*, 9 Cush. 68.)

This case was approved in *McKimm v. Mann*, 141 Mass. 507, 6 N. E. 740; in which the court said: "The ward's death effectually dissolves the relations of guardian and ward, and leaves upon the guardian the duty of a mere custodian of the property. He can no longer appear in court to defend a suit against the ward. (*Whitney v. Whitman*, 4 Mass. 508). In ordinary cases of agency, if the principal dies, the agency is determined by mere operation of law; and it will make no difference, even though the power is declared in express terms to be irrevocable. (*Marlett, v. Jackman*, 3 Allen, 278, 294; Story, Ag. § 488.) No reason is apparent why a guardian's power should survive the death of his ward. Like other agents whose authority has ceased, he must hold the property remaining in his hands until it can be delivered over, and must settle his accounts; but his guardianship is at an end. And we cannot doubt that the death of the ward is a discharge of the guardian, within the meaning of Pub. St. c. 139, § 28."

Upon a similar statute of Michigan, Judge Campbell said: "The question then arises, what is meant by the discharge of a guardian? It is claimed by the defense that it means the termination of his official character. For the plaintiff it is claimed that it means his discharge by final settlement. The only section of the statutes bearing on this question which have been called to our attention are Comp. Laws, sections 4816, 4836, (How. Ann. St., sections 6308. 6328.) The

former provides that every guardian shall have the care and management of the estate, and continue in office until the minor reaches majority, 'or until the guardian shall be discharged according to law.' The latter section provides for the resignation and removal of guardians, which can only be done during the minority of the ward, and while there is, therefore, a disability to sue. It has been the uniform understanding that the office itself terminates in all cases when the ward comes of age, or ceases to be incompetent, and after that time the ward may settle with his guardian without the intervention of the probate court if he chooses, and the guardian can do no further act as guardian, but becomes discharged of his office.' (*Probate Judge v. Stevenson*, 55 Mich. 320).

Construing a similar statute in Wisconsin, Judge Shiras said: "The second question presented is whether it appears that the action is barred by the lapse of time. The express provision of section 3968 is that 'no action shall be maintained against the sureties on any bond given by a guardian unless it be commenced within four years from the time the guardian shall be discharged.' This is a special limitation for the benefit of sureties, and does not effect the right to recover from the guardian. The limitation begins to run 'from the time the guardian shall be discharged.' On part of plaintiffs it is argued that the guardian is not discharged until there has been a final accounting and settlement, and an order or judgment entered adjudging the amount due, from the guardian, and ordering its payment. This construction would make the words 'shall be discharged,' equivalent to the terms 'final settlement of accounts.' Practically this may be in the majority of instances, the time when the guardian is discharged. For instance, when the ward becomes of age, it is the duty of the guardian to settle his accounts, and turn over all property in his hands belonging to the ward. The fact that the ward comes of age does not, *ipso facto*, change the relation in which the guardian holds the property from that of a statutory trustee to that of a debtor. Holding the property of the

ward, he is bound to exercise proper care thereof, and his duty and obligations will continue until he has duly accounted for and delivered up possession of the property. But is this true in case of the death of the guardian before the ward comes of age? In such case the personal care and management of the property by the guardian is at an end. Are the sureties on the guardian's bond to be held liable for the acts or negligence of others than their principal? Is not the guardian discharged when, by any reason, he is relieved from any further control over the property of the ward? Such a discharge does not relieve from liability from all past acts; but is he not discharged from further liability by reason of the fact that his power to control is at an end? The death of the guardian ends, of course, all personal control over the property. His estate becomes liable for all sums found due to the wards. If it is ascertained that at the date of the death of the guardian a certain sum was in the hands of the guardian, belonging to the wards, and the same is not paid, the sureties on the bond may be liable therefor; but, under the statute, suit thereon must be brought within four years from the discharge of the guardian, and it seems to me that death is such a discharge." (*Hudson v. Bishop*, 33 Fed. 519.) This decision was affirmed by Judge Brewer in 35 Fed. 820.

Harris v. Calvert, 44 Pac. 25, is a very recent case from Kansas upon this subject, and cites numerous authorities to the same effect. Among other things, the court said in that case: "This, then, brings us to the question, 'When does the guardian's term of office expire?' This may occur in various ways. We will only notice two that are applicable to the case, viz: (1) the death of the guardian; (2) the ward becoming of age. (9 Am. & Eng. Ency. of Law, page 95; 2 Kent on Comm., 221-227; *Stroup v. State*, 70 Ind. 495; *Overton v. Beavers*, 19 Ark. 625; *Probate Judge v. Stevenson*, 55 Mich. 320, 21 N. W. 348; *People v. Brooks*, 22 Ill. App. 594; *Glass v. Woolf's Adm'r.*, 82 Ala. 281, 3 South. 11; *Ross v. Gill*, 4 Cal. 250; *In re Allgier*, 65, Cal. 228, 3 Pac. 849; *Klemp v. Winter*, 23 Kan. 699.) In *Probate Judge v.*

Stevenson, supra, it is held: 'Guardianship ends when the ward becomes of age. The guardian then can do no further act as such, but is discharged of his office, and his ward may settle with him, if he chooses, without the intervention of a probate court, and the termination of a guardianship is equivalent to the discharge of the guardian.' "

We are therefore of opinion that the death of the ward terminated the relations of guardian and ward. In this case the ward judicially died on October 11, 1890, and, as far as the relations between guardian and ward were concerned, the guardian was then discharged or removed. He ceased to be a guardian. He, however, was not discharged from liability to account for the property to the ward, or to the ward's estate. (*Harris v. Calvert* and *Hudson v. Bishop, supra*.) But, his office of guardian ceasing, he was thus discharged or removed within the meaning of the statute of limitations, contained in section 404, as construed in the cases above cited. Therefore the statute of limitations (§ 404, *supra*) in this case had run when the action was commenced, and the demurrer below was properly sustained, unless, in the language of section 404, "at the time of the discharge or removal of the guardian the person entitled to bring such action was under legal disability to sue." The question, therefore, is, was the plaintiff in this case under a legal disability to sue prior to the filing of the guardian's account and its confirmation? Appellant claims that he was under such legal disability, for the reason that the cause of action had not yet arisen. We conceded above, for the purposes of this decision, that the cause of action did not accrue until the confirmation of the guardian's report. (See cases cited on this point above.) But is this a legal disability in the plaintiff? We think that it is not. A legal disability to sue pertains to the person desiring to sue. This subject was discussed by Judge Sawyer in *Meeks v. Vassault*, in which case the court said:

"This being so, it is insisted by plaintiff's counsel that, since neither he nor his grantors, the heirs of Harlan, could maintain an action for the recovery of the lands in contro-

versy pending the administration, or until distributed by the probate court on November 6, 1869, they were under a legal disability to sue, within the meaning of section 191 of the probate act; and, the action having been brought within three years after the said distribution, that it is not barred. Section 191 is as follows: 'The preceding section shall not apply to minors or others under any other legal disability to sue at the time when the right of action shall first accrue; but all such persons may commence such action at any time within three years after the removal of the disability.' The question is, what is the meaning of the phrase, 'any legal disability to sue,' as here used? This provision does not define the term 'legal disability.' It assumes that there are other disabilities known to the law, and we must go to the law as it existed outside of this section to ascertain what they are. The provision mentions 'minors,' and adds, 'or others under any legal disability.' Upon turning to the general statute of limitations, we find specified as disabilities, infancy, insanity, imprisonment for criminal offenses, coverture, etc., but neither in that nor in any other statute is anything of the kind now claimed as a disability named or recognized as such. The definition of 'disability' as given by Bouvier, is, 'The want of legal capacity to do a thing.' (Bouvier's Law Dictionary.) The disability may relate to the power to contract or to bring suits, and may arise out of want of sufficient understanding, as idiocy, lunacy, infancy or want of freedom of will, as in the case of married women and persons under duress; or out of the policy of the law, as alienage when the alien is an enemy, outlawry, attainder, *præmunire*, and the like. The disability is something pertaining to the person of the party,—a personal incapacity,—and not to the cause of action, or his relation to it. There must be a present right of action in the person, but some want of capacity to sue. In this case there was no want of power or capacity in the person. The difficulty is in his relation to the subject-matter of the suit." (*Meeks v. Vassault*, 3 Sawy. 206.)

We may turn to our own statute, as did Judge Sawyer to

that of California, and ascertain what are generally legal disabilities to sue. Section 39, Code of Civil Procedure, provides as follows: "Section 39. If a person entitled to commence an action for the recovery of real property, or for the recovery of possession thereof, or to make any entry or defense founded on the title to real property, or to rents or services out of the same, be at the time such title descends or accrues, either, first, within the age of majority; or, second, insane; or, third, imprisoned, on a criminal charge, or in execution upon conviction, of a criminal offense for a term less than for life; or, fourth, a married woman, and her husband be a necessary party with her in commencing such action or making such entry or defense."

We notice the following definitions of "disability" in law dictionaries:

"Disability: The want of legal ability or capacity to exercise legal rights either special or ordinary, or to do certain acts with proper legal effect, or to enjoy certain privileges or powers of free action. At the present day disability is generally used to indicate an incapacity for the full enjoyment of ordinary legal rights; thus married women, persons under age, insane persons, and felons convict are said to be under disability. Sometimes the term is used in a more limited sense, as when it signifies an impediment to marriage, or the restraints placed upon clergymen by reason of their spiritual avocations. Disability is either general or special; the former when it incapacitates the person for the performance of any legal acts of a general class, or giving to them their ordinary legal effect; the latter when it debars him from one specific act." (Black Law Dict.)

"Disability: The absence of legal ability to do certain acts or enjoy certain benefits; such as the disability to sue, take lands by descent, to enter into contracts, to alien property, etc.

"Section 3: As a rule, 'disability' means a general disability, especially a disability to sue. (Co. Litt. 128a.) Disabilities of this kind are of importance with reference to the statutes

of limitation and relating to adverse possession, (*q. v.*) which allow persons under certain disabilities an extended time within which to enforce their right. (Stats. 3 and 4 Wm. IV. c. 27, § 16 includes 'absence beyond seas,' (*q. v.*) in the list of disabilities, although it is strictly speaking, only a disadvantage or 'impediment,' as Stats. 21 Jac. I. c. 16, § 4, rightly calls it." (Rap. & L. Law Dict.)

"Disability: Incapacity for action under the law; incapacity to do a legal act. A personal incapacity, and may relate to powers to contract or to sue, and arise from want of sufficient understanding, as in cases of lunacy and infancy; or for want of freedom of will, as in cases of coverture and duress; or from the policy of the law, as in cases of alienage, outlawry, and the like." (And. Law Dict.)

The accruing of the cause of action is not personal to the plaintiff proposing to sue. It is not a disability on his part. If it be objected that we are thus holding that the statute of limitations commences to run before the cause of action arises, the answer is simply that this statute of limitations is different from the ordinary ones, and specifically provides that which is unusual, viz: that the limitation shall commence at the discharge or removal of the guardian, and not at the time of the accruing of the cause of action. The matter was treated in the Michigan case above cited, (*Probate Judge v. Stevenson*, 55 Mich. 320, 21 N. W 348,) in which the court said: "There is, therefore, no hindrance in the way of seeking an accounting, and a guardian is bound to be ready to account as soon as his trust comes to an end. The remedy to compel accounting is summary, and it cannot generally consume much time. And inasmuch as a failure to account is as much a breach of duty as a failure to pay over money, the cases cannot be very numerous in which a recourse to the bond cannot be had within the statutory period. The discharge cannot very well have more than one of two meanings. It must mean either the end of the guardianship office, or the discharge from liability. It cannot mean the latter, because that would preclude any occasion for resort to the bond. The object of the statute

was evidently, to make a uniform rule of limitation; and it is long enough to prevent injustice in both cases, if not universally."

If it should be held, when occasion arose, that the cause of action did not accrue until the filing and confirmation of the guardian's final report, still the period of limitation would be very little reduced, for the reason that the accounting of the guardian could be compelled within a very short time, and after such accounting and confirmation ample time would remain within the period of limitation, in which to commence the action after the same had accrued. In any event, this is a question of positive statutory law, and a matter in which the legislature has exercised its discretion in making this provision.

We are therefore of the opinion that the demurrer was properly sustained as to all these defendants who were sureties on the guardian's bond. But the provision of this statute (section 404) is a limitation for the benefit of the sureties, and not the principal. (*Hudson v. Bishop*, 32 Fed. 915.) Section 404 would not bar the action as against the principal, the defendant Marsh. The demurrer did not plead that the action was barred as to Marsh, although counsel signed the demurrer for Marsh and the sureties. There was, therefore, nothing in the demurrer for which it should have been sustained as to Marsh. The judgment in favor of all defendants except Marsh will be affirmed. As to Marsh the case is remanded, with directions to set aside the judgment in his favor and overrule the demurrer.

Reversed in part.

PEMBERTON, C. J., and HUNT, J., concur.

WHITEFOOT, RESPONDENT, v. NATIONAL FRATERNITY
BUILDING AND LOAN ASSOCIATION, APPELLANT.

[Submitted April 9, 1896. Decided April 13, 1896.]

BUILDING AND LOAN ASSOCIATION—Action to recover subscription—Pleading.—Under chapter 33, Fifth Division of the Compiled Statutes, providing for the organization of building and loan associations and authorizing a member to receive back the amount of subscriptions paid in by him upon withdrawing from the association, a complaint in an action by a member so withdrawing, to recover his subscriptions, which fails to allege that the defendant association was organized under the provisions of such chapter, is bad on general demurrer. (*Wetthey v. Kemper*, 17 Mont. 491, cited.)

SAME—Same—Pleading—Interest.—In an action by a withdrawing member against a building and loan association to recover the amount of his subscriptions and interest, where the statute authorizes repayment in such case of the amount of the subscription paid in, together with such interest as the by-laws may determine, the complaint, in order to support a recovery for interest, should state the rate of interest which the by-laws had determined.

Appeal from Ninth Judicial District, Gallatin County.

ACTION by member of building and loan association to recover subscriptions paid in. Judgment was rendered for the plaintiff below by ARMSTRONG, J., on demurrer to the complaint. Reversed.

Statement of the case by the justice delivering the opinion.

The defendant appeals from a judgment entered against it upon the overruling of its demurrer to the complaint. The complaint was brought under the provisions of chapter 33, Division 5 (General Laws), Compiled Statutes, and particularly section 648 of that division. The complaint set up that the defendant is a corporation, duly organized and doing business under the laws of this state; that plaintiff was a subscriber to the stock of said corporation, and for 30 shares thereof; that, as such subscriber for stock held in said corporation, he has paid to the corporation, at different times, divers sums amounting to the total of \$264. These payments, the complaint alleges, were regular monthly payments, due from the plaintiff to defendant on said stock; that on the 1st day of

May, 1893, the plaintiff gave notice to defendant that he intended and desired to withdraw as a stockholder and subscriber in the defendant corporation, and that he demanded payment to him of the amount of moneys which he had so paid to the corporation, with interest at the rate of 8 per cent. from the date of each payment, and offered and tendered to defendant his passbook and certificates, amounting to the sum of \$298.62; that such payment was refused; and that there is now due him \$298.62, and interest from date of filing the complaint, at the rate of 8 per cent. To this complaint the demurrer was filed, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. This demurrer was overruled, and judgment entered for the plaintiff.

C. W. Morse and Cockrill & Pierce, for Appellant.

D. C. Campbell, for Respondent.

DE WITT, J.—The plaintiff claims upon argument that, the defendant being a corporation, organized under chapter 33, Fifth Division of the Compiled Statutes of 1887, providing for the organization of building and loan associations, and that he, plaintiff, being a stockholder in the same, and having paid subscriptions as alleged in his complaint, is entitled to demand the moneys so paid to be returned to him under the provision of section 648, which is one of the sections of said chapter 33. The provision of that section which is material to this inquiry is as follows:

“That any stockholder desiring to withdraw from said corporation, shall have power to do so by giving sixty days’ written prior notice thereof, and at the expiration of sixty days from date of service of such notice, such stockholder shall be entitled to receive the amount paid in by him, and interest thereon at such rate per annum or such proportion of the profits thereon as the by-laws may determine, less any initiation fee, and all fines and other charges assessed against such stock pursuant to the provisions of the by-laws.”

The law as to building and loan corporations has this pro-

vision just quoted, which is unusual, and not found in laws as to corporations generally. The plaintiff, having paid in his subscription, if he is to recover them back in an action, must state the facts entitling him to demand such recovery. In this respect the complaint is fatally defective. There is no allegation whatever that the defendant was organized under the special corporation statute, to wit, Chapter 33. In corporations other than building and loan associations, the subscriber could not so demand the return of his subscription. The complaint should have alleged that the defendant was organized under the provisions of this Chapter 33. The plaintiff is seeking to recover under a specific statutory provision made in his favor, and he does not pretend to bring himself within that provision. In the case of *Wethey v. Kemper*, 17 Mont. 491, the action was against the trustees of a corporation, seeking to hold them liable for corporate debts, by reason of a failure to file, in the office of the clerk of the county where the business is carried on, a report stating certain matters required by the statute. We there held that the complaint was bad because it failed to state in what county the business of the corporation was being conducted. We said in the case: "In order to recover of the defendant as trustee, it was certainly necessary that the plaintiff should prove that no report was filed by the corporation, or any person whose duty it was to file the same under the statute, with the clerk and recorder of the county in which said corporation carried on its business. If it was necessary to prove this, it was necessary to allege the failure to file the report with the clerk and recorder of the county in which the business was carried on. We think that the complaint, under the authorities, is fatally defective." We think it is equally necessary in this case to plead that the defendant was the sort of corporation from which the plaintiff would be entitled to demand back the subscriptions which he paid in.

The complaint does not state the rate of interest or such proportion of the profits which the by-laws of the corporation had determined. Therefore the allegation in the complaint de-

manding 8 per cent. interest would not be sufficient to entitle the plaintiff to recover any interest. But, notwithstanding this defect, the complaint would be good on general demurrer if it showed that plaintiff was entitled to recover his subscriptions without interest. The demurrer should have been sustained upon the grounds first above mentioned, and for that reason the judgment will be reversed, and the case remanded, with instructions to sustain the demurer.

Reversed.

PEMBERTON, C. J., and HUNT, J., concur.

CRISWELL, RESPONDENT, v. MONTANA CENTRAL
RAILWAY COMPANY, APPELLANT.

[Submitted April 1, 1896. Decided April 13, 1896.]

CONSTITUTIONAL LAW—Railroads—Liability to employe.—Section 697, Fifth Division of the Compiled Statutes, declaring the liability of the corporation to an employe injured through the negligence of his superior to be the same as if the employe were a passenger, being originally part of an act for the incorporation of railroad companies in the territory, and having application only to corporations created under such act, imposes upon domestic railroad companies a burden not imposed upon foreign railroad companies operating within the state and was therefore annulled by the adoption of the state constitution, in which (§ 11, Article XV) foreign corporations are prohibited from enjoying within the state any greater privileges than enjoyed by like corporations created under the laws of the state.

SAME—Self executing provisions.—Section 11, Article XV of the constitution, declaring in effect that domestic corporations shall not be discriminated against in the enjoyment or possession of rights and privileges that may be accorded to foreign corporations of like character, is self executing as a prohibition, but not as an affirmative imposition upon, or securement to, foreign companies of the rights or privileges only accorded by state laws to domestic companies.

ON REHEARING. For former report see 17 Mont. 189. Reversed.

W. W. Dixon, A. J. Shores, Cullen & Toole and C. W. Bunn, for Appellant.

George F. Shelton and Largent & Huntoon, for Respondent.

HUNT, J.—Having decided by the opinion of the chief justice that section 697 of the Compiled Statutes of 1887

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18	297
18	167
21	87

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24	164
24	168
24	169

18	167
34	338
18	167
37	89

(Fifth Division) modified the common law rule in regard to the liability of railroad companies to their servants for the negligence of servants of a higher grade (17 Mont. 189), the court granted a rehearing upon this further question, which was not urged upon the original argument, but which became vital in consequence of the views of the court, namely : What effect did section 11 of Article XV of the constitution of the state have upon said section 697 of the Compiled Statutes ?

Section 697 being quoted in full in the opinion, it is unnecessary to repeat it. The contention of the appellant is that it was intended by the legislature that said section was to apply, and was applied, only to corporations formed under the act approved May 7, 1873, and that the rule of liability established by section 697 has never been extended by subsequent legislation; hence, that when the state was admitted and a constitution was adopted, in 1889, section 697 was applicable only to domestic railroad corporations; and that, therefore, the section imposed upon domestic railway companies a burden that was not imposed by any law of Montana upon railroad companies doing business within this state, which were organized under the laws of any other state.

The material part of section 11 of Article XV of the constitution of the state is as follows: "And no company or corporation formed under the laws of any other country, state or territory, shall have, or be allowed to exercise, or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of the state."

Examining section 697 of the statutes, we first find it as section 20 of "An act to provide for the formation of railroad corporations in the territory of Montana," passed over the governor's veto, on May 7, 1873 (Laws of Montana, 1873, Extra Session, page 93, *et seq.*) That act provided, as its title indicates, for the incorporation of railroad companies in the territory. The number of persons who might constitute the body corporate, the certificate required, the powers to carry out the objects of the incorporation, the regulation of the pay-

ment of the capital stock, the organization of the board of directors, the right of way over public lands, and powers and proceedings for purposes of condemnation, the time when operations must be commenced, the powers of the company to borrow money, the regulations of fares and freight rates, the annual reports to the territorial auditor; and other matters appropriate to the exercise of corporate powers, and to the regulation of corporations formed for railroad construction and operation, were covered by the 25 sections of the law. Throughout these sections references are to corporate associations under "this act" (§§ 2, 12-14); or named in "said certificate of incorporation" (§ 7); or "to any railroad corporation incorporated under this act" (§ 8); or to "such road" (§ 9); "such corporation" (§§ 11, 15-18).

Section 19 provides that "nothing in this act shall be construed to make the territory * * * responsible for any debts or obligations of any character which may be contracted by such corporations." Then comes section 20 (§ 697 of the Compiled Statutes), as follows :

"Section 20. That in every case the liability of the corporation to a servant or employe acting under the orders of his superior shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employe not appointed or controlled by him, as if such servant or employe were a passenger."

Section 21 pertains to the amount of capital stock of "said corporation," and to the expenses of the construction of "said road."

Section 22 expressly refers to "said corporations formed hereunder."

Sections 23 and 24, relating to freight rates and accounts, do not appear so clearly by particular words to be expressly limited to domestic corporations. although it would seem that when considered with the whole context, which pertains to the formation of railroads within the territory, and with relation to the fact that in 1873 there were no railroads within the territory of Montana to be regulated, these sections, too, were

limited in their application to railroads formed under the act of which these two were part.

But that section 20 refers to corporations created under the act in which that section is found is clear from the particularization of corporations to be made liable in every case. "The corporation" is equivalent to the words "any corporation formed under the provisions of the act controlling the incorporation of railroad companies within Montana." This construction is literal; it is also in harmony with the sense of the words and clauses in the different parts of the statute, and with the subject-matter and general purpose thereof. The courts cannot extend the application of the particular provision referred to beyond the apparent intent of the legislature.

There were several statutes enacted in 1887 permitting certain foreign railroad companies to extend their railway lines into Montana (Compiled Statutes, Division 5, Section 702, *et seq.*); but the respondent does not argue, nor do we think it could be maintained, that by such provisions there was expressed or implied any purpose other than to confer upon such foreign companies such corporate rights, powers, immunities, and franchises as are necessary to the complete exercise of the privileges of building, maintaining, and operating their extended lines within the territory.

Holding, therefore, that section 697 applied to domestic railroad corporations only, what effect did the adoption of the constitution of the state have upon that section? No comment is necessary to demonstrate that a rule of liability by which a domestic railroad company may suffer heavily for negligence of an employe, where another, but foreign, railroad corporation cannot be made liable at all for like negligence, is the imposition of a burden upon the former, and not upon the latter.

Whether or not the legislature of the state may establish certain rules of liability between *foreign* railway companies, which it may permit to operate lines within the state, and their employes is immaterial to the question under consideration. We are not discussing the extent of power of the legislature over *foreign* corporations. In this decision it is not

necessary to go farther than to ascertain whether the constitution of the state by section 11, Article XV, *supra*, annulled section 697, which was applicable to domestic corporations alone, or whether it extended said section so as to make it applicable to all railroad companies, foreign and domestic. The constitutional section under consideration established a principle that domestic corporations shall not be discriminated against in the enjoyment or possession of rights and privileges that may be accorded to foreign corporations of a like character. Just what rights, what privileges, what burdens or liabilities, in detail, should be granted or imposed, were not defined by the constitutional convention. Those are matters within the sphere of legislation subject always to the constitutional limitation upon such legislation. Take the instance before us. The whole subject of what the rule of liability of a corporation for personal injury to its employes may be, where the corporation is negligent, was left to the legislature to control by appropriate statutes, the constitution simply ordaining that all home companies shall be protected against laws discriminating against them, and in favor of foreign companies, and always, as provided by section 17, Article XV, that contracts entered into between corporations and their employes, where, as a condition of employment, the corporation shall be released or discharged from liability on account of personal injury received by the servant, while in the service of the corporation, by reason of the negligence of such corporation, or the agents or employes thereof, shall be null and void.

The learned counsel for the respondent argues that section 11 is self-executing. We agree with him in that contention, but not to the extent he would apply the doctrine of self-execution. The prohibition lays down a principle of protection to domestic corporations that at once, upon the adoption of the constitution and the admission of the state, became a sufficient rule by means of which the rights and privileges possessed by domestic companies were and are protected against legislative or other discriminations extending

the possession or enjoyment of rights or privileges to foreign corporations greater than those already possessed, or those that may be attempted to be granted by any future action. To this extent the provision was completely self-executing, and no legislation was required to give the prohibition full force and operation. (Cooley on Constitutional Limitations, page 99.)

But we cannot assent to respondent's position that the object of the constitutional provision was to establish uniformity with respect to the two classes of corporations by making laws that were applicable only to the domestic class at the time of the adoption of the constitution extend to the foreign class, in order to make an equal liability for all, or that the clause does establish uniformity by so operating upon such territorial laws. As said, the inhibition at once, by itself, prevented the discriminations; but there is no affirmative language, and no intent by the words used, to extend to foreign companies the burdens, rights, and privileges imposed or granted by law to domestic corporations. In this respect legislation must be had to affect such corporations by force of law.

By section 1 of the schedule of the constitution, all laws enacted by the legislative assembly of the territory, and in force at the time the state was admitted into the Union, and not inconsistent with the constitution, should be and remain in full force as the laws of the state until altered or repealed, or until expired by their own limitation. This provision is likewise self-executing. By it, rights were preserved. It operated of itself to keep in force a system of laws for the government of the state, unless such laws were inconsistent with the constitution. But, as to any such repugnant statutes, it operated as an effective repeal, for, when the constitution became the fundamental law, acts in conflict with it yielded; and when the question of a conflict is presented to the court, and the conflict clearly appears, the statute must be decided to be inoperative and void. (Cooley on Constitutional Limitations, page 58.) As the supreme court of Illinois has very

recently said, by way of repetition of one of its earlier decisions: "The understanding with all persons is that a law passed, either before or after the adoption of the constitution, which is repugnant to its provisions, must be held to be of no valid force, and precisely as if it had been repealed before the performance of the act." (*Washington Home of Chicago v. City of Chicago*, 157 Ill. 414, 41 N. E. 893.)

We find high authority for our opinion in the case of *Norton v. Commissioners*, 129 U. S. 479, 9 Sup. Ct. 322, where the supreme court refused to uphold the doctrine that, when a state government commenced under a new constitution, an act of the legislature was amended by a constitutional provision so as to substitute a vote of three-fourths for that of a majority of votes cast at an election for or against the issuance of bonds. The court refer to the argument that the constitution extended the law to the enactment of a statute, and reject the view that a law inconsistent with the constitution when adopted is re-enacted, "so to speak," by a section like No. 1 of the schedule to the constitution of Montana.

"The power of ordinary legislation," says Chief Justice Fuller, "is vested under all our constitutions, in the legislatures, and the constitutional convention of Tennessee did not assume to exercise such power. The amendment of a law is usually accomplished according to a prescribed course, and there is nothing here to justify the conclusion that section 29 of Article II was designed to operate by way of amendment to prior laws nor can it so operate, nor the act of 1870 be held to have been kept in force, for the reasons already indicated." (*Norton v. Commissioners*, 129 U. S. 479, 9 Sup. Ct. 322.)

From these views it follows that the prohibition clause against any discrimination against a domestic corporation is self-executing as a prohibition, but not as an affirmative imposition upon or securement to foreign companies of the rights or privileges expressly only accorded by the state laws to domestic companies. It also follows that by section 697, originally a territorial statute, a greater burden was put upon

appellant than was placed upon a foreign company of a similar character. The statute, therefore, being inconsistent with the constitution was annulled by the adoption of the constitution.

The judgment of this court heretofore rendered, affirming the judgment of the district court is set aside and reversed, and the judgment of the district court and the order overruling a motion for a new trial are reversed, and the cause is remanded, with directions to grant a new trial.

Reversed.

PEMBERTON, C. J., and DE WITT, J., concur.

RED MOUNTAIN CONSOLIDATED MINING COMPANY,
RESPONDENT, v. ESLER, APPELLANT.

[Submitted April 2, 1896. Decided April 18, 1896.]

INJUNCTION—Temporary order—Tenants in common of mining property.—Where it appeared on application for a preliminary injunction in an action by the owner of the majority interests in mining premises, that the defendant, as lessee of the owner of the minority interests, while not actively excluding plaintiff company, was working the properties and extracting ores therefrom against the protest of the plaintiff, that defendant had promised plaintiff's president to desist but had resumed operations when the latter left the state, and had attempted to conceal shipments of ore, the granting of the injunction on the ground that defendant as a tenant in common was assuming exclusive ownership over the property, within section 582, Code of Civil Procedure, will not be disturbed on appeal as an improper exercise of judicial discretion. (*Anaconda Copper Mining Co. v. Butte & Boston Mining Co.*, 17 Mont. 519, cited.)

Appeal from First Judicial District, Lewis and Clarke County.

INJUNCTION. Plaintiff's application for a temporary injunction was granted by BUCK, J. Affirmed.

B. P. Carpenter and Massena Bullard, for Appellant.

I. One tenant in common of a mine has the right to work it, on failure of his cotenants to work it. (a) At common law he has the right to work it (and take all the profits). (*McCord*

v. *Oakland Mining Co.*, 64 Cal. 134; *Pico v. Columbet*, 12 Cal. 414; 1 Washburn on Real Property, page 694, *et seq.*; *Early v. Friend*, 14 M. R. 271, 16 Grattan 21; *Graham v. Pierce*, 14 M. R. 308, 19 Grattan 28.) (b) Properly working a mine by one tenant in common is not waste. (*McCord v. Oakland Mining Co.*, 64 Cal. 139, 142, 148; *Neel v. Neel*, 19 Penn. St. 328; *Irwin v. Covode*, 24 Penn. St. 162; *Vervalen v. Older*, 10 M. R. 540; *Job v. Potton*, 14 M. R. 329; *Crary v. Campbell*, 3 M. R. 270; *Coleman's Appeal*, 14 M. R. 221; *Early v. Friend*, 14 M. R. 271; *Hihn v. Peck*, 18 Cal. 643.) (c) A mine is of no value if forever idle. Mines are useful only for the production of ore. The general purpose of the ownership of a mine is that ore may profitably be extracted therefrom, and courts will not give to a statute any doubtful construction to prevent the working of a mine. Public policy will be considered. (Freeman on Cotenancy, etc., § 249a; *Gaines v. Green Pond Mining Co.*, 15 M. R. 153, 159 and cases cited; 4 Kent. (Marg.) page 77; *Falls v. McAfee*, 7 M. R. 639.) (d) The extraction of ore by a proper working of a mine does not lessen its value within the meaning of the Montana statutes, when the ore is accounted for. The objecting cotenant gains more than he loses. The extraction of ore is the ordinary use of a mine. (Cases *supra*.)

II. (a) Section 529 of the Code of Civil Procedure was not intended to prevent any tenant in common from properly working a mine in case his cotenants refused to work it or join with him in working it. (b) The owner of the greater interest may always control the working of the mine. If no tenant in common wishes to work it it may be idle. If all work it together, there is a mining partnership, and the majority in interest can control. In this case there is no semblance of a mining partnership. (Civil Code of Montana, §§ 3350, 3359; *Stuart v. Adams*, 89 Cal. 367.) If the majority in interest will not work it at all, this failure to work it will not be permitted to freeze out the minority interest. (c) Section 592 was intended to prevent, not the use, but the abuse of common property by a cotenant.

H. G. & S. H. McIntire, for Respondent.

PER CURIAM.—The defendant appeals from an order granting an injunction *pendente lite*. Plaintiff is owner of the majority fractional interests in certain mining claims. Defendant is lessee from the owner of the minority fractional interests of said claims. Plaintiff asked a preliminary injunction, which was granted, restraining defendant from working the mines. From that order this appeal is taken.

These temporary injunctions rest largely in the discretion of the district court. (*Anaconda Copper Mining Co. v. Butte & Boston Mining Co.*, 17 Mont. 519, and cases cited.) We think that it appears from the record sufficiently to justify the discretion exercised by the district court that the defendant was alone working the mines; that, while he was not actively excluding the plaintiff from participation in the work, still the defendant was acting alone, and against the protests and objections of the plaintiff; that after the plaintiff, through its president, so objected and protested, the defendant promised to cease operations; that after this promise the president of the plaintiff, who seems to have been acting in its behalf, left the state temporarily, and that thereupon the defendant again commenced to prosecute his mining operations; that, while defendant alleges he is willing to account for the proceeds of the ore mined, still it appears that the plaintiff, through its president, was obliged to resort to the proceeding of stopping payment for the ores at the smelter, in this state; and that, after payment on said ores had been so stopped, the defendant clandestinely shipped the next quantity of ores to a smelter outside of the state. While expressing at this time no opinion as to what should be the final decision of the case after all the facts appear upon examination and cross-examination of witnesses, we are of opinion that the facts recited, and before the district court, were sufficient to sustain the discretion of that court in finding, as a preliminary question, that the defendant was assuming and exercising exclusive ownership over the property jointly owned by the parties. (Code of Civil Pro-

cedure, § 592; *Anaconda Copper Mining Co. v. Butte & Boston Mining Co.*, 17 Mont. 519.) The order of the district court is affirmed.

Affirmed.

HUNTER, RESPONDENT, v. CONRAD ET AL., APPELLANTS.

[Submitted March 30, 1896. Decided April 13, 1896.]

CONTRACTS—Partnership—Participation in profits—Election.—Where H. loaned defendants, a banking firm, \$5,000 for a certain period, under an agreement that in consideration of the loan said H. should be entitled to the rights of an equal partner, without liability for losses, and at the expiration of the period named should receive one-third of the net profits accruing in the business, with the privilege of continuing the agreement, and in the event of the one-third of the profits not equaling in amount ten per cent. per annum on the loan, H. might waive his right to profits, whereupon defendants would pay him interest on the loan at ten per cent. per annum, and at the expiration of such period H. exercised his option to take the interest on his money instead of participating in the profits, this arrangement did not make H. a partner with the defendants as between themselves, nor constitute the loan a contribution to the capital stock.

SAME—Election under agreement—Sufficiency of notice.—In such case where H. was acting as cashier of the bank, and at the expiration of the contract made the proper entries in the books showing his election to take the interest instead of the third of the profits, such entries were a sufficient notice to defendants that he had so elected.

Appeal from Sixth Judicial District, Park County.

ACTION on promissory note. The cause was tried before HENRY, J. Plaintiff had judgment below. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action on a promissory note. The execution of the note is admitted. The defendants allege, in their answer:

“(1) That on the 15th day of June, 1892, and for a long time prior thereto, the defendants, J. H. Conrad and S. C. Hunter, were and had been partners, engaged in the business of banking at Red Lodge, Montana, under the firm name and style of J. H. Conrad & Co.

“(2) That on the said 15th day of June, 1892, the said L. R. Hunter, being desirous of becoming a member of the said

partnership, advanced to the said partnership the sum of five thousand dollars, which said advance was evidenced by the note in suit, and an agreement was then and there entered into between the said J. H. Conrad and S. C. Hunter and L. R. Hunter whereby the said L. R. Hunter was then and there to become an equal partner in the said banking business, which said agreement was in words and figures as follows, to wit :

“ ‘Red Lodge, Montana, June 15th, 1892. January 1st, without grace, after date, for value received, we, or either of us, jointly and severally, promise to pay to the order of L. R. Hunter five thousand dollars, payable at the office of J. H. Conrad & Co., bankers, Red Lodge, Montana. J. H. Conrad. S. C. Hunter.’ ”

“ ‘For and in consideration of the above loan of five thousand dollars (\$5,000), by L. R. Hunter, to J. H. Conrad and S. C. Hunter, doing business as bankers in Red Lodge, Park county, Montana, the said L. R. Hunter shall receive one-third of the net profits accruing in the said banking business, and he shall be entitled to all the rights and privileges of an equal partner, during the period of this contract, which shall continue in full force and effect until the 1st day of January, 1893, the said L. R. Hunter reserving the right to continue the contract for a longer period provided it may be agreeable to all concerned. And it is further agreed that the said L. R. Hunter shall in no way be liable for any losses incurred in said banking business. And it is further agreed that, in event of the one-third profits not equalling in amount ten per cent. per annum on the five thousand dollars (\$5,000), then and in that event the said L. R. Hunter waives his right to any of the profits accruing, and the said J. H. Conrad and S. C. Hunter agree to pay him interest on the loan at the rate of ten per cent. per annum. J. H. Conrad. S. C. Hunter.’ ”

“ ‘Indorsements : ‘Pay the within to Thomas Hunter, or order. L. R. Hunter.’ ”

The defendants allege that, pursuant to said arrangement and contract, the payee of the note, L. R. Hunter, became, ever since has been, and now is, a partner and member of the

firm of J. H. Conrad & Co.; that the note was given solely as evidence of the contribution of said L. R. Hunter to the capital stock of the firm of J. H. Conrad & Co.; that the note became null and void as an evidence of debt after the election of L. R. Hunter to continue the partnership, which they allege he did on the 1st of January, 1893; that the plaintiff acquired whatever title he has to the note subsequent to its maturity, with a full knowledge of all the facts regarding its execution, and the purpose for which it was to be used, and with the full knowledge of the fact that it represented L. R. Hunter's contribution to the capital stock of said firm, as a partner in said firm, and that it was to be void after said L. R. Hunter elected to continue in said firm after the 1st of January, 1893.

The replication admits the execution of the contract set up in the answer, but denies that L. R. Hunter was ever a partner or member of the firm of J. H. Conrad & Co., and every other allegation of the answer.

The case was tried to a jury. The jury rendered special findings of fact, and a general verdict for the plaintiff. From the judgment rendered in accordance therewith, and an order overruling their motion for a new trial, the defendants appeal.

Savage & Day, for Appellants.

The parties had reduced their agreement to writing, and it was the duty of the court after hearing the testimony of the witnesses as to the attending circumstances to interpret such contract to the jury. Whether the effect of the agreement was to constitute a partnership was a matter for the determination of the court. (*Meehan v. Valentine*, 29 Fed. Rep. 276; *Parchen v. Anderson*, 5 Mont. 438; *Thompson on Trials*, § 1132; *Cumpston v. McNair*, 1 Wend. 457; *Dunlay v. Elford*, 22 S. C. 304.

The court in giving the first three instructions submitted to the jury the question of a loan, which we submit is not supported by the evidence in the case. The contract taken in

connection with the subsequent dealings of the partners clearly contemplated the existence of the partnership between the date of the agreement and January 1, 1893. There was shown here a participation in the business as a partner which supplied the element wanting in the case of *Meehan v. Valentine*, *supra*.

O. F. Goddard, for Respondent.

PEMBERTON, C. J. The appellant assigns as error the giving of the instructions of the court, contending that they are not supported by the evidence. The instructions are as follows:

“(1) If you believe from the evidence in the case, that the \$5,000, mentioned in the first cause of action of plaintiff's complaint, were a loan made by L. R. Hunter to J. H. Conrad and S. C. Hunter, and were not a contribution to the capital stock of said firm; that said L. R. Hunter was to receive 10 per cent. on said sum in case he so elected to take said sum in lieu of profits, and that said L. R. Hunter did, on the first day of January, 1893, elect to take 10 per cent. on said sum,—then you will find for the plaintiff upon the first cause of action.

“(2) The jury are instructed, that if you find, from the evidence, that the \$5,000, as evidenced by the note in suit, were advanced by L. R. Hunter, as a loan to the defendants, and that said note was conditioned upon the election of L. R. Hunter to become a partner, and that such election was to be made by L. R. Hunter January 1, 1893; and if you find that he did elect, on or about the said date, not to become a member of said firm and a partner therein, but on the contrary he elected to waive his right to profits in the said business, and to claim the 10 per cent. interest on the said advance, and in pursuance of said election, charged up the interest of the said advance upon the books of the bank,—such election and such entry would be sufficient notice to the defendants of such election.

“(3) The jury are instructed that if you find, from the evi-

dence, that the \$5,000, as evidenced by the note in suit, were advanced to the defendants as a loan, and that L. R. Hunter elected, under the contract attached to the note, on or about January 1, 1893, to take interest on the sum so advanced at 10 per cent. per annum instead and in lieu of one-third of the profits of the banking business of J. H. Conrad & Co., then the charging in the books of the bank of the said interest by L. R. Hunter, the cashier, would be sufficient notice to the defendants of such election on the part of the said L. R. Hunter."

The jury found, in effect, that L. R. Hunter was never a partner in the banking business of J. H. Conrad & Co., and that the \$5,000 put into the business by L. R. Hunter was a loan.

The contract designates the \$5,000, the amount of the note, as a loan, in consideration of which J. H. Conrad and S. C. Hunter were to allow L. R. Hunter one-third of the profits of the banking business of J. H. Conrad & Co., during the existence of the contract, and, in the event of the one-third of the profits not equaling 10 per cent. per annum on the \$5,000, then L. R. Hunter waives his right to profits, and is to be paid 10 per cent. per annum for the loan of said sum.

The evidence is practically undisputed that, about the 1st of January, 1893, L. R. Hunter elected to take 10 per cent. interest on said loan. It seems the one-third of the profits of the business fell short of equaling 10 per cent. on the \$5,000. L. R. Hunter testified that he informed S. C. Hunter, about January 1, 1893, of the condition of the business, and that he had taken his 10 per cent. interest, instead of one-third of the profits, as it is conceded he had a right to do under the contract. S. C. Hunter does not dispute this evidence. He says he will not testify that L. R. Hunter did not so inform him about the 1st of January, 1893. It is shown also that about the 1st day of January, 1893, L. R. Hunter, who was the cashier, and in charge of the banking business of J. H. Conrad & Co., made the proper entries in the books of the concern, showing his election to take the 10 per cent. interest,

instead of the one-third of the profits of the business. From this consideration of the testimony, we think there was sufficient evidence to support the findings of the jury and the instructions of the court.

Under the contract, L. R. Hunter had the option of electing, on the 1st of January, 1893, to take 10 per cent. interest on the \$5,000, or one-third of the profits, and continue the contract with J. H. Conrad & Co. He made his election to take the 10 per cent. and thereby made the \$5,000 a loan to the defendants. Had he not made this election, it is immaterial to consider what his relations would have then been.

There are many circumstances in the case which would constitute L. R. Hunter a partner and member of the firm of J. H. Conrad & Co., as to the public dealing with him and the firm; but between the parties to the contract and arrangement these circumstances cannot avail the defendants. The question here is, not whether L. R. Hunter held himself out to the world as a partner, but was he, in fact, a partner? We think the court rightly instructed the jury as to the law of the case, and that the evidence supports the findings that, as between the parties to this suit, L. R. Hunter was not a partner, and that the \$5,000, the amount of the note sued on, was a loan.

Whether L. R. Hunter became a partner and member of the firm of J. H. Conrad & Co., as between the parties, by entering into the contract attached to the note, is principally a matter of intention. (Lindley on Partnership, 8, 9.) This intention may be shown by the contract, and the circumstances attending its execution. A very strong circumstance in the case going to show that the parties to the contract considered the \$5,000 in controversy a loan, and so construed it, is the fact that J. H. Conrad and S. C. Hunter executed to L. R. Hunter their note therefor. If the \$5,000 were contributed to the capital of the firm, by L. R. Hunter, as his share thereof, why the necessity or the reason for Conrad and S. C. Hunter executing their note to him for the amount? If it was a contribution to the capital, no note was necessary to be given for any conceivable purpose.

We think loaning J. H. Conrad & Co. the \$5,000 in consideration of one-third of the profits of the business did not necessarily constitute L. R. Hunter a partner as between the parties to the suit. (*Gill v. Ferris*, 82 Mo. 156; *Legett v. Hyde*, 58 N. Y. 272.)

Another circumstance going to show that the parties considered the \$5,000 a loan, and not a contribution to the capital of the firm, is the provision in the contract that L. R. Hunter should not be liable for losses.

We think the case was fairly tried, and the proper result reached. The judgment and order appealed from are affirmed.

Affirmed.

DE WITT and HUNT, JJ., concur.

GILLESPIE, RESPONDENT, v. DION, APPELLANT.

[Submitted April 7, 1896. Decided May 4, 1896.]

18	183
18	198
18	356
19	224

ELECTIONS—Special proceeding—Jurisdictional facts.—An election contest authorized by section 1043, Fifth Division of the Compiled Statutes, being a special proceeding, the jurisdictional facts must appear on the face of the proceedings, and therefore, where the statute permits a contest to be instituted only by an elector, the omission of the contestant to show by averment on the face of the record that he is an elector is fatal.

SAME—Statement of contest.—Amendment.—In an election contest instituted under section 1043, Fifth Division of the Compiled Statutes, where the contestant's statement failed to state a jurisdictional fact, no amendment offered or made after the lapse of the ten days allowed by the statute for instituting the contest could cure the defect or give the court jurisdiction to act.

SAME—Sufficiency of statement.—Amendment.—Under section 1043, Fifth Division of the Compiled Statutes, requiring the contestant of an election to file, within ten days thereafter, a statement specifying the grounds of contest, a statement merely alleging that marked ballots were voted and counted in a certain precinct, and that owing to confusion at the time the votes were counted, mistakes were made, and which failed to state that the contestant was a candidate for the office in question, or that any one of the ballots were unlawfully marked, or the nature of the alleged mistakes, or that they affected the result, or the number of votes cast at that precinct, or that any electors were prevented from voting by fraud or other misconduct, is insufficient. A statement so defective cannot be cured by amendment after the time allowed by law for commencing proceedings has expired. (*Heyfron v. Mahoney*, 9 Mont. 497, cited.)

Appeal from Seventh Judicial District, Dawson County.

ELECTION CONTEST. Judgment was rendered by MILBURN, J., declaring the election void as to both parties. Reversed.

Statement of the case by the justice delivering the opinion.

The plaintiff, Gillespie, seeks to contest the election of Henry Dion, the defendant and contestee, to the office of county treasurer for Dawson county. On November 21, 1894, the plaintiff commenced this proceeding, by filing the following paper with the county clerk of Dawson county :

“State of Montana, County of Dawson—ss. : To James McCormick, County Clerk of Dawson County, Montana : At a meeting of the board of canvassers of Dawson county, held at Glendive, on the 12th day of November, 1894, Henry Dion was declared elected to the office of treasurer of said county. Now, therefore, I notify you that I will contest the said election at the next meeting of the district court of the Seventh judicial district, state of Montana, on the following grounds : (1) That marked ballots were voted and counted at said election in said county in the precinct in Glendive, and that, owing to the noise and confusion existing at the time the votes in said precinct were being counted, many mistakes occurred; and, from information received, it is my firm belief that, if said votes were recounted, it would result in showing a majority for me, sufficiently large to have elected me, instead of Henry Dion; and I will respectfully ask the court to order a recount of the votes cast in said precinct. (2) That the poll books from Redwater precinct, in said county, do not show that the judges and clerks were sworn when canvassed by the canvassing board of said county, as required by law. [Signed] Alex. S. Gillespie.

“State of Montana, County of Dawson—ss. : I, Alexander S. Gillespie, having read the foregoing affidavit, solemnly swear that the said affidavit is true, and, as to those matters therein stated on the information and belief, that I believe them to be true. [Signed] Alex. S. Gillespie.

“Sworn to and subscribed before me, this 21st day of No-

vember, 1894. James McCormick, County Clerk and Clerk of the Board of County Commissioners. [Seal of Dawson County, Montana.]”

On the same day, the county clerk and the clerk of the board of county commissioners of Dawson county issued the following notice :

“State of Montana, County of Dawson—ss. : To Henry Dion, Contestant : Take notice that you are hereby required to appear on the first day of the next term of the district court of the Seventh judicial district in and for the county of Dawson, to be held at Glendive, in said county, at which time and place all grounds of contest of your election at the last general election held in said county, November the 6th, A. D. 1894, as treasurer of the said county of Dawson, specified in the statement hereto annexed, will be brought before the said court for trial. Witness my hand and the seal of Dawson county, this 21st day of November, A. D. 1894. James McCormick, County Clerk and Clerk of the Board of County Commissioners. [Seal.]”

The record shows that on November 21, 1894, the sheriff personally served the writ or statement by delivering a true copy to the defendant. On December 17, 1894, the papers were filed in the district court. On January 28, 1895, the defendant filed a motion to quash the statement. This motion was very specific. It alleged that the statement was insufficient to give the court jurisdiction to hear and determine any contest whatever, or at all, and did not state facts sufficient to warrant the relief prayed for, or any relief, in that it did not show : (1) That A. S. Gillespie is an elector of the county of Dawson, or state of Montana; or that he was a nominee for the office of treasurer for Dawson county. (2) In that it failed to show that Gillespie had any interest whatever in the contest, or that said Gillespie would be benefited in any way whatever, or at all, if a hearing was had or instituted by the court under said notice. (3) In that the statement failed to show the number of ballots that were marked and voted in Glendive precinct, and failed to show that any distinguishing

mark was upon said ballots other than that provided for in sections 23 and 24 of "An act providing for printing and distributing ballots at the public expense, and to regulate voting at territorial and other elections," approved March 13, 1889.

(4) In that the statement failed to show how the ballots were marked, or whether the same was a distinguishing mark thereon, so that the same could be identified or was identified; and further failed to show that such ballots were marked with a view to identify them, or that any electors or nominees were prejudiced by marks placed thereon; and further failed to show that the marks upon any ballot were prejudicial in any way to said Gillespie. (5) In that the statement failed to show that the judges of election of Glendive precinct committed any mistakes or errors in canvassing the vote of said precinct; and further failed to show what act done and performed by them constituted a mistake. (6) In that the statement failed to show that there was any noise or confusion made or existing at Glendive precinct when the vote was being counted. (7) In that the statement failed to show that any vote or votes were counted for Henry Dion, as treasurer for Dawson county, by the judges of election of Glendive precinct, or any precinct in Dawson county, which were not cast for him; and further failed to show that any illegal vote or votes were canvassed or counted for Henry Dion, as treasurer for Dawson county, in any precinct in Dawson county. (8) In that the said statement failed to show that the judges and clerks who counted and canvassed the votes of Redwater precinct were not sworn in fact.

This motion was denied by the court. The defendant excepted.

On February 4, 1895, the plaintiff filed an "amended notice and grounds of contest." To support his motion for leave to file the amendment, plaintiff filed an affidavit to the effect that the facts set forth in his amended notice concerning two precincts, to wit, Tokna and Newlon, were not known to him at the time he filed and served his original notice of contest, on November 21, 1894, although he had used and exercised all possible diligence to discover the same.

The amended paper, after setting forth that the defendant herein, Henry Dion, was declared elected to the office of treasurer at a meeting of the board of canvassers of Dawson county, held at Glendive, county seat, on November 12, 1894, proceeded by notifying said Henry Dion that he (Gillespie) would contest the election of said Dion as treasurer of said county, at the next approaching meeting of the district court, upon the following grounds. The grounds set forth specified that Gillespie is, and at all times mentioned in the notice was, an elector and citizen and resident of Dawson county, and that, at the last election held in the said county, he was a candidate for county treasurer, for which office he had been regularly and duly nominated. Then followed specifications to the effect that, owing to the noise and confusion while the clerks were keeping the tally of the votes cast at said election, it was impossible for said clerks to make correct and accurate tallies of the names announced as being voted for; and that, at the end of the counting, there were discrepancies in the two tally lists by the two clerks, of five or six votes; and that certain ballots had private marks put upon them, for the purpose of distinguishing said ballots; and that, in another precinct, certain votes were counted for Dion and for this affiant, when in reality there ought to have been more counted for affiant than were actually counted for him; and that the defendant was declared elected by a majority of three over plaintiff, whereas, if the ballots cast at certain specified precincts could be recounted and correctly counted, instead of a majority of votes being found for Dion, a majority would be found for Gillespie. The prayer was for a recount under the direction and order of the court, and that Gillespie be by the court duly declared elected county treasurer.

Dion's counsel opposed the motion for leave to file this amended notice and grounds of contest, and excepted to the order of the court permitting the same to be filed. Dion then filed a demurrer, raising the question of jurisdiction and other general and specific objections, based particularly upon the ground that the statements in relation to the alleged discrep-

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ancies and marks upon the tallies and the ballot were not sufficiently specific.

On May 7, 1895, Gillespie filed certain "proposed amendments to the complaint." These amendments were substantially additional specific averments concerning the tally lists of the votes cast and polled in the Glendive precinct, wherein it appeared that by the tally kept by one James M. Rhoades, who had been a candidate at said election for the office of assessor, Gillespie had a majority of at least six instead of three votes for county treasurer in Glendive precinct. There was another averment concerning the number of votes at Newlon precinct. Accompanying these amendments, Gillespie filed his affidavit to the effect that he never knew anything about these matters in detail until the time when he filed his application to amend. The court granted this leave, whereupon Gillespie filed his "second amended complaint and notice of contest." This second amended complaint and notice of contest was a very ample statement of all original and amended grounds of contest, as heretofore substantially set forth.

Dion moved to strike out this second amended complaint and notice of contest, upon the ground that permission of the court had not been received or granted to file such a document, and that no complaint had ever been filed in the case, and that the document was an original pleading, and not an amended one. On May 14, 1895, the court denied Dion's motion, to which order Dion duly excepted. Dion then filed a demurrer to the second amended complaint and notice of contest, against raising the question of jurisdiction over the person of said Henry Dion or the subject of action, and again setting forth in full the grounds upon which he relied, and which were substantially those set forth to the prior amended statement. On August 27, 1895, Dion moved to strike out the first and second amended statements or complaints and notices of contest, because the same were not properly filed and served in accordance with section 1043, Fifth Division, General Laws (Compiled Statutes, 1887), and because each constituted an entirely new cause of action, and was barred under section 1043.

The court denied these motions, and allowed the defendant twenty days to answer. Exceptions were preserved. Dion filed an answer to the original notice and grounds of contest, denying all averments of Gillespie's original notice and grounds of contest, to the effect that there were mistakes, and, if a recount were had, a majority would be found large enough to elect Gillespie instead of Dion. Dion also denied all the grounds of contest in the amended notice and grounds of contest, expressly saving his exceptions to the rulings of the court in allowing the contestant to file an amended notice and grounds of contest. He also denied the averments of the second amended complaint or statement specifically.

A trial was had to the court. The court found that neither Dion nor Gillespie had a legal majority, and that the election certificate issued to Henry Dion should be, and was, annulled and declared void. Dion appeals to the supreme court from the decision of the court declaring the office vacant by reason of a tie vote, and from the orders refusing to quash Gillespie's statement, and to strike out the second amended notice of contest from the rulings of the court on the demurrer.

Two ballots which were before the court appear in the record, but, as the decision only pertains to the jurisdictional question in the case, it is unnecessary to set forth more fully what occurred on the trial before the court. No point being made in the court upon the second ground of the original statement, that the poll books from Redwater precinct did not show that the judges and clerks were sworn, that question is eliminated from the case

T. C. Holmes, Henri J. Haskell, and Ella Knowles Haskell,
for Appellant.

The statement filed by contestant with the county clerk did not specify any grounds of contest, as required by Section 1043, Fifth Division Compiled Statutes. It merely states that marked ballots were voted and counted at said election in said county in the precinct of Glendive, and that many mistakes occurred. This is not a statement of any ground of contest.

(Mechem on Public Officers, § 224, 226; Paine on Elections, § 825; *Smith v. Harris*, 32 Pac. 617; McCreary on Elections, § 400, 405; *Lehlback v. Hayes*, 23 Atl. 422; *Soper v. Commissioners*, 48 N. W. 1112.) The statement is fatally defective and insufficient to confer jurisdiction for the further reason that it does not appear therefrom that Gillespie is a person (an elector) authorized by Sections 1043 of the Fifth Division Compiled Statutes to contest the election of the defendant Dion. (Mechem's Public Office and Officers, § 215; McCrary on Elections, § 399; *Blanck v. Pausch*, 113 Ill. 60.) The court not having jurisdiction, could not of course, authorize Gillespie to file "an amended notice and ground of contest," (6 Am. & Eng. Ency. of Law, page 407,) or make any lawful order in the premises except to dismiss the case for want of jurisdiction.

If a contest be authorized, the mode of contest and of trial will rest absolutely in the legislative discretion. (Paine on Elections, § 793.) The requirements of the statute are jurisdictional. (*Albee v. May*, 8 Black, (Ind.) 310; *Payne on Elections* § 809.) And no act of the parties can confer it. (*Bores v. Kolors*, 23 Minn. 445. When the law prescribes a mode of deciding cases of contested elections, designed to be final, the courts have no authority to adjudicate such cases other than that which the law confers upon them. (Paine on Elections, § 793. *Wright v. Fawchette*, 42 Tex. 203; *Lindsay v. Sackett*, 20 Tex. 516; *Wright v. Fawchett*, 42 Tex. 203; *Schwartz v. County Committee*, 23 Pac. 84; *Vailes v. Brown*, 27 Pac. 945.) If the time for filing the petition or notice has passed, and the original notice (statement) was not sufficient to confer jurisdiction, it cannot be acquired by an amendment setting up new matter. (6 Am. & Eng. Ency. of Law, 407; *Batterton v. Fuller*, (S. D.) 60 N. Y. 1071; *Anderson v. Mayers*, 50 Cal. 525.

Strevell & Porter, for Respondent.

HUNT, J.—This proceeding is special in its character, author-

ized by Section 1043, Fifth Division, Compiled Statutes of Montana. The statute, ungrammatical as it is, is as follows:

“All contests of county and township officers shall be tried in the proper county, and when an elector shall wish to contest such an election he shall file with the clerk of the board of county commissioners, within ten days after such person shall have been declared elected, a statement in writing, specifying the grounds of contest, verified by affidavit, and such clerk shall issue to the contestant a notice to appear at the time and place specified in the notice, before the district court, which notice, with a copy of such statement, shall be delivered to the sheriff, who shall within five days, serve the same upon the contestor by delivering to him a copy of such notice and statement, or by leaving such copy at his usual place of residence. That in all contested election cases, or rights thereto, existing, or which may hereafter occur, when the said notice shall not have been served or given in compliance therewith, the same shall be a bar to any and all persons making such contests, and all actions and rights of action thereto.” The words contestant and contestor plainly should be contestee.

The consideration of the jurisdiction of a court to hear and determine matters in litigation being one which presents itself in *limine*, we will therefore examine this question raised by appellant. (*Chadwick v. Chadwick*, 6 Mont. 566.)

The power of the court to hear and determine the matter, and to render the judgment rendered, is regulated by the terms of the statutes (sections 1043 and 1044) alone. The court is, therefore, limited to the exercise of express powers conferred. If a case was not presented by the contestant which brought the power of the district court into action, then there was no jurisdiction, and the contestee's motion to quash should have been sustained.

That election contests, at least prior to the adoption of the Codes, were special, and meant to be of a summary nature, is evident by the procedure laid down. The method of their commencement was by a statement and notice in the county clerk's office, rather than by complaint and summons in regu-

lar civil action. The time in which the statement of the grounds of contest might be filed was limited to ten days after the contestee had been declared elected. The notice must have been given and served within a limited time. The judge must have at the time specified, proceeded to try the contest; and a certificate of the clerk of the district court was obliged to issue to the person declared to be elected by the court, by virtue of which certificate the person so declared to be elected was entitled to enter upon and hold office until the decision of the district court might be reversed on appeal. The court not having jurisdiction of such statutory contests by virtue of its organization alone, they were included in such special proceedings, jurisdiction of which was conferred by the legislature.

The supreme court of California, in *Dorsey v. Barry*, 24 Cal. 449, held that election contests, under statutes analogous to those of Montana, were special proceedings, distinct in form and substantially different from the common-law remedy. Bliss on Code Pleading, (§ 1, note,) classes "election contests" as special proceedings. So does Works on Courts and Jurisdiction (page 467.)

In *Schwartz v. County Court*, 14 Col. 44, 23 Pac. 84, the court said: "The proceedings upon an election contest before the county judge, under the statute, are special and summary in their nature; and it is a general rule that a strict observance of the statute, so far as regards the steps necessary to give jurisdiction, must be required in such cases."

The proceeding, therefore, being special the rule is that the jurisdictional facts must appear on the face of the proceedings. (Sutherland on St. Const., § 391, and authorities cited.)

We think it plain that no one but an elector can invoke the aid of the statute cited; and, when the statute is so invoked, the party seeking its benefits must bring himself within its spirit and its letter. The law says an elector may contest an election for county and township offices. This excludes all others (except, perhaps, by appropriate proceedings in *quo warranto*), not electors. For instance, one not a citizen of the

United States; one who, although a citizen of the United States, had not resided in the state of Montana and county of Dawson the required length of time; one under 21 years of age; one who had been convicted of felony, and not pardoned; a woman,—none such could contest the election of defendant or contestee, under section 1043. It was the letter and policy of the law that if the will of the people had not been correctly pronounced,—if persons declared elected had not been in fact,—electors might contest by simply following the provisions of the statute; but, on the other hand, to avoid vexatious intermeddling by those not interested in the political affairs of the county, the statute permits such contests to be instituted only by those qualified to vote themselves, and does not extend the right to any others. The person instituting such a statutory contest must therefore make it affirmatively appear by the statement that he is an elector, and thus entitled to institute the proceedings to give the court jurisdiction.

In *Edwards v. Knight*, 8 Ohio 375, Edwards produced in court a copy of a notice duly served upon Knight, that the election of Knight as prosecuting attorney would be contested by Edwards. Pursuant to statute, the contest was docketed, when Knight moved to quash the proceedings, assigning as cause the lack of jurisdiction in the court, and that it did not appear from the notice that Edwards was an elector or candidate. The court of common pleas quashed the proceedings. The supreme court said: "The third objection, that Edwards shows no right as candidate or elector to contest the seat, seems to us well taken. The candidate is not presumed to know all the electors in his district, and he is bound to respond to none except those who show, in the notice, the right to question, which forms the basis of the proceeding. The contestor offers proof that he was an elector, but we think the right should appear on the record. This opinion is in analogy with the settled course of decisions in this court under the bastardy act, requiring the facts that the mother is an unmarried woman, and resident in Ohio, to be set forth in the complaint."

This case is approvingly cited by McCrary on Elections (3d Ed. § 399), who says: "Where the statute provides that the election of a public officer may be contested by 'any candidate or elector,' the person instituting such contest must aver that he is an elector, or that he was a candidate for the office in question. This must appear on the face of the record, and it is not enough that the contestant offers proof that he is an elector. The incumbent is not bound to answer or take notice of a complaint which does not contain this averment."

In *Schwarz v. County Court*, cited above, the supreme court of Colorado says: "It provides for a written statement as the basis of the proceedings, and designates what it shall contain, and the officer with whom it shall be filed. It designates the officer by whom the summons shall be issued, and provides the time and manner of making up the issues. Provision is also made for fixing the time of trial, and for the form of judgment to be entered, etc. As we have seen, the jurisdiction of the court, under such a statute, depends entirely upon the terms of the act, and consequently, before contestors can invoke such jurisdiction, facts must be stated by them which bring the cases within the purview of the act." See, also, *Clanton v. Ryan*, 14 Col. 419, 24 Pac. 258.

In *Batterton v. Fuller* (S. D.), 60 N. W. 1071, under a statute which required the statement and notice to be embraced in one paper, called by statute "the notice of contest," it was held that such notice of contest was a jurisdictional paper, and must be sufficient upon its face to give the court jurisdiction, otherwise it was not effectual as a notice of contest, and gave the court no jurisdiction. See, also, Paine on Elections, § 809; *Rutledge v. Crawford*, 91 Cal. 534, 27 Pac. 779; *Wright v. Favocett*, 42 Tex. 203; *Vailes v. Brown* (Col. Sup.) 27 Pac. 945.

This omission to aver on the face of the record that contestant was or is an elector (whether in the body of the statement or in the affidavit is, perhaps, immaterial) is therefore fatal; and the court never having acquired jurisdiction by the first purported statement, filed within ten days after Dion was

declared elected, no amendment offered or made after the ten days had elapsed could give it power to act. The paper filed was not one to which Dion was obliged to give attention at all, and, the statute requiring the statement to be filed within ten days from the date of the declaration of the election of Dion being peremptory, the time cannot be enlarged by the court. (*Wilson v. Lucas*, 43 Mo. 290; *Bowen v. Hixon*, 45 Mo. 340.)

The reason given by McCrary on Elections (section 392) for placing statutory limitations upon the time within which election contests must be instituted is, that it is of the utmost importance that promptness be required in commencing and prosecuting such proceedings, in order that a decision may be reached before the term was wholly or in great part expired.

In *Vailes v. Brown*, heretofore cited, an election contest was dismissed because the statement of contest was not filed within the time required by the statute, and, by reason of such omission, the court acquired no jurisdiction of the case.

The contestant, Gillespie, cites us to the case of *Blanck v. Pausch*, 113 Ill. 60, in support of the contention that, conceding it was necessary for the contestant to aver that he was an elector, still the right to amend was properly given by the court after the ten days had expired. There is a marked difference between the statutes of Illinois and Montana. By the laws of Illinois (§ 114 *et seq.*, c. 46, Starr & C. Ann. St.) it is expressly required that the statement is to be filed with the clerk of the court, and may be verified as bills of chancery are verified. Process is to be served as provided in cases of chancery, and "the case shall be tried in like manner as cases of chancery." Construing these statutes, the supreme court held in *Dale v. Irvin*, 78 Ill. 171, that the proceeding had all the incidents of a regular bill in chancery, and that power to amend, therefore, existed. The Illinois decisions cannot, therefore, apply to the statutes under consideration, and we adopt the doctrine laid down by McCrary in support of the Ohio case and of the Colorado decisions, under statutes more similar to ours, believing it to be safer in principle and reason.

These views upon the question of jurisdiction lead to the conclusion that the court ought to have sustained Dion's first motion to quash the proceedings for lack of jurisdiction, and that, jurisdiction not having been obtained by a statement filed within the time limited by law for instituting the contest no amendment in this respect made after the lapse of the ten days could avail the contestant.

We are of opinion, too, that the contestant's original statement was not one specifying the grounds of contest as contemplated by the statute, and that it was insufficient to grant contestant any relief. It did not state that contestant was a candidate for the office of county treasurer. There was no averment that any ballots were unlawfully marked, or improperly or unlawfully counted. It did not set forth what the nature of the mistakes alleged to have occurred were, or whether or not such mistakes directly affected the result. It did not state the number of votes given for either of the candidates at Glendive or any other precincts in the county or plead any excuse for not making such statement; nor did it state, or attempt to state, that any electors were prevented from casting their ballots by fraud or other misconduct. "If contestor does not show that, by reason of the illegal casting or rejection of votes, the result is different from what it otherwise would have been, the contest proceeding should not be entertained." (*Todd v. Stewart*, 14 Col. 286, 23 Pac. 426; *Paine on Elections*, § 825; *Smith v. Harris* (Col. Sup.), 32 Pac. 616.) The mere belief of the contestant that, if the votes were recounted, it would result in showing a majority for him, does not supply the radical omissions in the statement of contest. He should have particularized the facts upon which he draws his conclusion, to the end that the court may see that, if his specifications of grounds are true, he should be granted relief.

In a recent case in Oregon (*Whitney v. Blackburn*, 17 Or. 564, 21 Pac. 874), the court said of a notice and statement in an election contest as follows: "From the facts as set forth, it is manifest that they are not even reasonably or otherwise specific and certain, and that no one could be prepared to meet

charges preferred in such a general way, or, if any irregularity or illegality in fact did lie concealed behind them, to avoid being taken by surprise. The wording of the notice indicates, as was asserted at the argument, that the plaintiff did not know of a single error or illegal vote cast, but states the facts broadly and generally, because he was unable to point out, or to be reasonably specific and certain as to any count in his notice, or as to any irregularity or illegality of whatever kind, upon which to rely, or other facts to sustain his claim. * * * While it is the duty of courts to disregard mere technical rules or defects, and to liberally construe the law, that the rights of the people may be preserved, and that no protection may be afforded to fraud, yet he who undertakes to contest the right of another to an office to which he has been declared to be elected, by a tribunal chosen by the people, ought to have some well-defined 'cause,' and to be able to state it with sufficient certainty as to notify or inform the other party of the substance of the facts upon which he relies to defeat his title, and to authorize the court to make the inquiry."

Doubtless, amendments may be made to a statement sufficiently good to enable the proceeding to be considered, provided such amendments do not essentially change the grounds of the contest, or set forth grounds where none were originally stated; but, where the amendments are so radical as to virtually initiate a contest where really no grounds at all have been specified in the original statement, we are inclined to hold they ought not to be permitted after the ten days allowed by law for commencing proceedings have expired. (*Batterton v. Fuller, supra.*)

A dissatisfied elector should be vigilant. Under a statute that requires a specific statement to be filed, an elector ought scarcely to be allowed to file a general objection without specific grounds of contest within ten days after the election result is declared, and thereafter to file his specifications based upon grounds perchance discovered after the lapse of ten days after the contest was instituted.

In *Heyfron v. Mahoney*, 9 Mont. 497, cited by plaintiff (contestant), the transcript shows very full and explicit statements in relation to the various precincts where it was alleged by contestant that illegal votes were cast. The names of the alleged illegal voters were given at great length, and the exact canvass was set forth in detail. Upon the trial, Heyfron was allowed to amend by correcting certain voting lists, by altering the spelling of the names of certain persons, and by adding the names of other persons to such lists, which did not affect the judgment in the case, upon the principle that immaterial defects in pleadings in election cases should be disregarded, that the ends of justice might be promoted. But that was a statement very different from the paper called a "statement" in this case. Here the contestant is making a good statement out of nothing.

But for lack of jurisdiction, heretofore discussed, the judgment is reversed, and the proceeding dismissed.

PEMBERTON, C. J., concurs.

Reversed.

GILLESPIE, APPELLANT, v. DION, RESPONDENT.

[Submitted April 7, 1896. Decided May 4, 1896.]

See syllabus and opinion in *Gillespie v. Dion*, ante, page 183.

Appeal from Seventh Judicial District, Dawson County.

ELECTION CONTEST. Judgment was rendered by MILBURN, J., declaring the election void. Reversed.

Strevell & Porter, for Appellant.

Thomas C. Holmes, Henri J. Haskell and Ella Knowles Haskell, for Respondent.

PER CURIAM.—This is an appeal by Gillespie from the same judgment rendered in the case of *Gillespie v. Dion*, ante, page 183. The decision in that case, that the district court had no jurisdiction, disposes of this case, and renders further statement needless. Judgment reversed, and proceeding dismissed.

STATE EX REL. MILSTED, RELATOR, v. BUTTE CITY
WATER COMPANY, RESPONDENT.

[Submitted April 9, 1896. Decided May 4, 1896.]

18	199
18	365
18	567
18	100
20	552
18	199
23	203

PLEADING—Denial—Information and belief.—Under the Code of Civil Procedure of 1887, (§ 89) providing that “if the complaint be verified the denial of each allegation controverted must be specific and be made positively or according to the information and belief of the defendant,” a denial in a pleading that, as to a fact alleged, the pleader “has no knowledge or information upon which to found a belief and therefore denies the same,” is insufficient to present an issue.

WATER COMPANIES—Public purposes.—Unreasonable rules.—A water company, organized under the statute for the purpose of supplying a city and its inhabitants with water, and having been granted a franchise for that purpose, assumes obligations of a public nature and must exercise its powers in a reasonable manner, and therefore, where the inhabitant of a city occupying premises as a tenant, and requiring water for general purposes, but whose lessor had refused to be responsible for water rents, requests the company to turn on the water at his premises and tenders payment in advance, the refusal of the company to do so, under a rule not to supply water to rented premises except on the personal responsibility of the owner, and that if the water was turned on the money tendered would be credited to the owner, is unreasonable.

Appeal from Second Judicial District, Silver Bow County.

MANDAMUS. The writ was made peremptory by SPEER, J. Affirmed.

Statement of the case by the justice delivering the opinion.

Mandamus to compel the respondent, defendant, to turn on the water for general use at a certain house in Butte.

The petitioner avers that he is a citizen and inhabitant of Butte; that the defendant water company is a corporation existing under the laws of Montana, engaged in supplying the inhabitants of Butte with water, under a certain franchise granted to the predecessor in interest of said corporation by the city of Butte; that by the terms of said franchise the corporation is granted the right to lay its mains in the streets and alleys of Butte, and is required to supply the inhabitants of Butte with water for general use at specified prices; that the defendant corporation is in full use and enjoyment of the franchise; that one Murray is the owner of the premises involved;

that on June 12, 1894, the said Murray gave to relator a written order to the defendant company, requesting it to turn on the water at the premises, and to charge the same to the relator; that the relator is the tenant in possession of said premises; that, on presenting said order, relator tendered to the water company \$4.50, the amount allowed by the said franchise as water rents for the said premises for three months in advance, and demanded that the company turn the water on at said premises; that the premises are supplied with water pipes connected with the mains, and in proper condition to use water supplied by the said company; that the mains are supplied with water, but that the said premises are without water, because the company refused to accept the tender, or turn the water on at said premises; that there are no other means by which relator can secure water for said premises, unless his petition for a writ of *mandamus* is granted.

The respondent company answered, admitting that it is a corporation engaged in supplying the city of Butte and the inhabitants thereof with water, under a franchise, as set forth in the relator's petition. The answer admits the ownership of Murray, but pleads "that, as whether your relator is now a tenant in possession of the said premises, respondent has no knowledge or information upon which to found a belief, and therefore denies the same." It admits the presentation of the order and the demand for water, but alleges that it refused to turn on the water by virtue of its rules and regulations, by which it can deal only with the owners of property requiring water to be turned on, or the agents of such owners. The rule invoked by respondent is as follows: "The water company contracts with owners of property, or their authorized agents only, and the property is invariably held for water rent. When water is turned off for any cause, it will not be turned on again until all back rent due on that building is paid in full. Money paid by tenants will be credited to the owner, but in so doing the company does not in any way release the owner from liability under this rule."

Respondent further pleads that, when the premises involved

were connected with the mains, the owner, Murray, signed an application, requesting a supply of water for the property, subject to the rules and regulations of the respondent company, and that, when the said application was filed, the rule heretofore set forth was in force, and the said Murray knew it was in force. Respondent says that, when the relator made his demand that the water be turned on for said premises, he was notified that the company would deal only with the owner or his agent, and would not contract with the tenants to supply water to rented premises, except on the personal responsibility of the owner, and informed relator of the contents of the rule hereinbefore set forth. That the owner, Murray, at the time of relator's request that the water be turned on, refused to become personally responsible, or to allow his property to become responsible, for the payment of water rent; but that the respondent informed the relator that the money he tendered would be accepted, and the water turned on, but that the money so paid would be credited to the account of Murray, the owner of said premises. It is alleged then that the rule, as set forth, is reasonable and just, and without it the company cannot safely conduct its business; that, by virtue of its franchise, it supplies many of the inhabitants of Butte with water by meter measurement, and that, until the determination of the period for which a contract is made, and at which time the meters are read, it cannot determine what has been used, or to what amount the consumer is indebted to the company; that much property in Butte is occupied by tenants, and that, if respondent is obliged to deal with tenants, and look to them for pay of water, it would be subject to great loss and hardship; that it cannot, for reasons given, collect from the consumer in advance, and therefore is obliged to hold owners desiring water personally responsible.

Upon these pleadings the relator moved the court to make the alternative writ peremptory, notwithstanding the respondent's answer, for the reason that the matters set forth in said answer do not constitute a defense to relator's cause of action, or set forth any reason why said writ should not be made per-

emptory. The court granted this motion, and made the writ peremptory. The respondent appeals from the order sustaining the relator's motion to make the alternative writ peremptory.

Corbett & Wellcome, for Appellant.

Geo. Haldorn and Oliver M. Hall, for Respondent.

By the terms of the franchise appellant is required to supply the *inhabitants* of the city of Butte with water. By the terms of the rule in question the company is bound to refuse to supply an inhabitant of the city unless he is the owner of real estate. Conceding that respondent has the right to adopt reasonable rules for conducting his business, a rule that limits the class of persons to whom water will be supplied, to the owners of real estate is manifestly unreasonable. Where there is no such provision in the charter making a gas bill a lien on the real estate, it has been held that a gas company cannot refuse to furnish gas to a person because he refuses to pay a former bill, or a bill contracted on different premises. (*Gas Light Co. of Baltimore, v. Calliday*, 25 Md. 1; *Loyd v. Washington Gas Co.*, 1 Mackey (D. C.) 331.) Nor can it shut off the gas on the ground that there are arrears due from a former occupant of the premises. (*Morey v. Metropolitan Gas Co.*, 38 N. Y., Superior Court, 185.) Respondent further insists that the rule in question would not be binding upon him even if he stood in Murray's shoes. First for the reason that the rule is a limitation of the rights granted to the public by the terms of the franchise, and it is therefore void as being a rule of the company in contravention of the law that created it, and in derogation of the rights of the public. Second, because the rule in itself is not a reasonable one and the assent to it by Murray was without a valuable consideration, and would not be binding as a contract even on him. A promise to pay a person for doing what he is already bound to do is without consideration. (*Vanderbelt v. Schueyer*, 91 N. Y. 392; *Witless v. Ewing*, 40 Ohio St. 400; *Barlet v.*

Wyman, 14 Johns, (N. Y.) 260; *McCann v. Lewis*, 9 Cal. 246; *Hale v. Forbis*, 3 Mont. 395; Vol. 3, Am. & Eng. Ency. of Law, page 834 and cases cited in note 4.) It has been held that a gas company cannot refuse gas to a person on the sole ground that he refused to sign an agreement to accept gas subject to certain rules that were held to be unreasonable. (*Shephard v. Milwaukee Gas L. Co.*, 6 Wis. 539; 70 Am. Dec. 479; *Shephard v. Milwaukee Gas L. Co.*, 15 Wis. 318.)

HUNT, J.—The appellant contends that there was an issue of fact tendered by the answer of respondent upon the question whether relator was or was not a tenant in possession of the premises involved. But we think that the denial of respondent, that “as to whether relator is a tenant in possession of the said premises, it had no knowledge or information upon which to found a belief, and therefore denies the same,” was not good under Compiled Statutes, 1887 (Code Civ. Proc. § 89.) The court required a specific denial of the material allegations of the complaint controverted by the defendant. If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant.”

While there are cases and authors holding a denial such as respondent's good under codes quite similar to the Montana Code of 1887, in California this exact question was long since decided by Justice Field for the supreme court of that state, in *Curtis v. Richards*, 9 Cal. 34, where it was said of a denial like appellant's: “There are but two forms in which a defendant can controvert the allegations of a verified complaint, so as to raise an issue—first, positively, when the facts are within his own personal knowledge; and, second, upon information and belief, when the facts are not within his own personal knowledge. (Prac. Act, § 46.) These forms cannot be indiscriminately used. If the facts alleged in the complaint are presumptively within the knowledge of the defendant, he must answer positively, and a denial upon information and belief will be treated as an evasion. Thus, for example, in

reference to instruments of writing alleged in a complaint to have been executed by the defendant, a positive answer will alone satisfy the requirements of the statute. If the defendant has forgotten the execution of the instruments, or doubts the correctness of their description or copy in the complaint, he should, before answering, take the requisite steps to obtain an inspection of the originals. (Prac. Act, § 446.) If the facts alleged in the complaint are not personally within the knowledge of the defendant, he must answer according to his information and belief. In no case can an allegation of the complaint be controverted by a denial of sufficient knowledge or information upon the subject to form a belief. By the forty-sixth section of the Practice Act, as originally passed in 1851, it was provided that an allegation of the complaint must be controverted by a denial 'of any knowledge thereof sufficient to form a belief.' In practice this mode of denial was found to furnish a convenient pretext for evading the statute. In some instances, defendants became critical in their judgments, as to the extent of knowledge sufficient to form a belief, and would, without hesitation, deny, in that form, facts upon the existence of which they did not hesitate to act in other matters. In 1854, the forty-sixth section was amended to the present language, and the wisdom of the amendment is well illustrated in the present case." See, also, *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 467, where, on rehearing, the court adhere to the rule established in *Curtis v. Richards*.

The Montana Practice Act, as it appears in the Laws of 1887, having been principally taken from California, and having been modified in its requirements of what a denial must contain, and how it must be made, after the decision of the supreme court of the United States in *Maclay v. Sands*, 94 U. S. 586, reversing *Sands v. Maclay*, 2 Mont. 35, the construction of the California Code should have great weight in the construction of similar provisions of our practice act.

Bliss on Code Pleadings, § 326, says: "The pleader is not permitted to evade the statute. He must deny directly and

positively, or must deny, in the language of the statute, 'according to his information and belief.' To say that 'he has not sufficient knowledge to form a belief,' and therefore denies, will not do; nor will it be permitted to 'deny for want of information to enable them to admit.''' (Pomeroy on Code Rem. § 640; Estee's Pl. & Prac. § 3224.)

The supreme court of South Dakota, in *Cummins v. Lawrence Co.*, 1 S. D. 158, 46 N. W. 182, held that a denial, such as appellant has made in the case at bar, is not a denial of any fact averred, "but is a mere denial of any knowledge or information as to the alleged facts sufficient to form a belief in respect to their existence or nonexistence," and, of itself, is no defense. By statute of that state, however, such a denial is expressly authorized, and, by virtue of the statutory permission, that form of denial is held good. Maxwell Code Pl. p. 386, holds such denials good, but he does not refer to the California cases, and relies upon the single case of *State v. Commissioners of Hancock Co.*, 11 Ohio St., 183, to sustain his text. But it is evident, from an inspection of the Ohio case, that the statute in force was different from that of California and Montana.

It is observed that the new Codes of 1895 extend the method and form of denials, giving far more latitude apparently, than under the former practice. Code Civ. Proc. 1895, § 690. We shall follow the California cases, and hold that the statutory form of denial was the only one to be sustained. The denial, therefore, being insufficient, and no issues of fact being presented, the question for determination is: Can the appellant water company refuse to supply relator with water for general purposes at the premises involved?

The appellant is a water company, engaged in supplying the inhabitants of the city of Butte with water, under its franchise. The city gave the corporation the right to lay its mains in its streets and alleys. The company, on the other hand, is required to supply the inhabitants of the city of Butte with water for general use, at prices specified in the franchise granted. The relator is an inhabitant of Butte, occupying

premises wholly without water for general use, and there are no other means by which water for his house may be secured, except from the appellant corporation. Ought the appellant to be allowed to refuse his tender for water in advance, and to refuse him water upon the ground that, "by virtue of its rules and regulations adopted, it can deal only with the owners of the property requiring water to be turned on, or the agents of said owners?" We say not.

The performance of the duty the company undertook when it accepted the franchise granted was to supply the inhabitants of the city with water. "A waterworks company is a *quasi* public corporation. It must supply water to all who apply therefor and offer to pay rents." (Cook on Stock, Stockh. & Corp. Law, § 932.) The account of which the grant was given was a public purpose. (*Lumbard v. Stearns*, 4 Cush. 61.) Therefore, "the grant is subject to an implied condition that the company shall assume an obligation to fulfill the public purpose on account of which the grant was made." (Morawitz on Priv. Corp. § 1129.)

The view that supplying a city and its inhabitants with water for general purposes is a business of a public nature, and meets a general necessity, is sustained by the great weight of authority reviewed in a learned opinion of Lord, C. J., in *Haugen v. Water Co.* (Or.) 28 Pac. 244. It was there said: "The defendant, by incorporating under the statute, for the purpose of supplying water to the city and its inhabitants, undertook a business which it could not have carried on without the grant of eminent domain over the streets in which to lay its pipes. It was by incorporating for this purpose, and in accepting the grant, it became invested with a franchise belonging to the public, and not enjoyed of common right, for the accomplishment of public objects, and the promotion of public convenience and comfort. Its business was not of a private, but of public, nature, and designed, under the conditions of the grant, as well for the benefit of the public as the company."

Certainly, the company may make reasonable rules and reg-

ulations. Doubtless it may require payments in advance for a reasonable length of time. It may, within reasonable limitations, cut off the supply of those who refuse to pay water rents due. It may make regulations authorizing an examination of meters in houses at reasonable times, or adopt other reasonable rules for the regulation of its affairs. But it has no power to abridge the obligations, assumed by it in accepting its franchise, to supply an inhabitant of Butte with water, if he pays them for it in advance, and is a tenant in the possession and occupancy of a house in need of water for general purposes.

Whether the owner has made a contract with the corporation to hold himself personally liable or not, or whether he has signed any paper agreeing to subject his property to a lien for water rents, we will not discuss in this case. The water company in no case, however, can go beyond the powers granted to it, and such powers must be exercised in a reasonable manner; and, if it has adopted a by-law that is in conflict with its franchise, which may be termed its constitution, or is unreasonable or oppressive, the subordinate rule or by-law will be set aside. (Thompson on Corp. § 1010 *et seq.*)

This relator was entitled to water, and to a receipt for his payment, issued directly to him, and to have the amount of his payment credited to him alone, and the by-law pleaded by the company is, as to him, clearly unreasonable; and it is immaterial to his rights whether the owner had any agreement with the company or not, or whether, as tenant, he knew of the existence of any such agreement. The duty of the company, under its franchise, and undertaken to be fulfilled, must be performed. The order appealed from is affirmed.

Affirmed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

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McSHANE ET AL., RESPONDENTS, v. KENKLE ET AL.,
APPELLANTS.

[Submitted April 9, 1896. Decided May 4, 1896.]

MINES AND MINING—Location—Sufficiency of discovery—Instructions.—An instruction, in effect, that to constitute a discovery on a vein sufficient in law to justify a location, the vein must contain mineral, quartz or ore, of such a nature that a practical miner if he encountered it, would feel justified in following it up in the expectation of finding paying mineral in that particular seam upon which the discovery is made, is erroneous (1) in restricting a discovery to such a vein as "a practical miner" would feel justified in developing, instead of extending it to such a vein as the locator, whatever his vocation might be, would be justified in developing; and (2) in confining the discovery of paying mineral to "that particular seam" upon which the discovery is made, since a valid location may be made by the discovery of a seam, with a well defined wall, bearing indications of mineral sufficient to justify the locator in following it up in expectation of finding a main body of paying ore within the limits of the claim as located.

INSTRUCTIONS—Testimony.—Where a statement of testimony is contained in an instruction, the statement should be so framed as not to subject the instruction to the charge of being the court's conclusion from facts disputed on the trial.

Appeal from Sixth Judicial District, Meagher County.

ACTION in adverse claim. The case was tried before HENRY, J. Plaintiff had judgment below. Reversed.

Statement of the case by the justice delivering the opinion.

This is an adverse claim suit, brought under section 2326 of the Revised Statutes of the United States, to determine the right of possession to certain premises in conflict. Plaintiffs' adverse claim is founded upon a quartz location called the "Grafton Lode," made May 12, 1891. Defendants' claim is founded upon a quartz location called the "Silver Safe Lode," located December 10, 1889. The ground in controversy is a little over eight acres. On April 19, 1890, a location called the "Rush Stone Quarry" was made by one Peter Rush. This stone quarry location includes a considerable portion of both the Silver Safe and Grafton lode locations, and in November, 1890, was conveyed by Rush and another to one Condon. Condon, in April, 1890, had also become an owner,

by deed of conveyance, of an interest in the Silver Safe lode, but had deeded his interest therein September 3, 1893, to one Kenkle, also a defendant in this suit.

The cause was tried to a jury. On the trial, the testimony went principally to the sufficiency of the original discovery of the Silver Safe lode, and to the question whether the representation work had been done for 1890, 1891 and 1892 on the Silver Safe lode, and whether certain work, which plaintiffs claimed Condon caused to have done in December, 1890, in the Rush stone quarry, did not amount, so far as defendants were concerned, to an abandonment on their part of the Silver Safe lode.

The jury found for the plaintiffs. Judgment was entered accordingly. Motion for new trial was made, based upon the insufficiency of the evidence to support the verdict, and upon errors of law. The motion was overruled, and defendants appeal.

Max Waterman and H. G. McIntire, for Appellants.

Toole & Wallace, for Respondents.

HUNT, J.—The principal question in this case turns upon the instructions. The court, after stating to the jury that three steps are indispensable to a valid location of a mining claim,—to-wit: (1) A discovery; (2) a marking of the boundaries; and (3) a record,—charged in relation to a discovery as follows :

“On this point you are advised that, to make a discovery, the would-be locator must have found a vein or crevice of mineral-bearing quartz, rock, or ore in place, with at least one well defined wall. A vein or crevice is said to exist when ore is found within defined boundaries, and, if the boundaries are well defined, slight evidence of ore may be sufficient; while, on the other hand, a clearly defined ore body, with one well defined wall, will be enough. The matter within the boundaries must be mineral-bearing quartz, rock, or ore; and, before a sufficient discovery to justify a location can be said to have

been made, there must have been found a vein, the course of which can be readily determined through the surrounding rock, and that this vein *must contain mineral, quartz, or ore of such a nature as that a practical miner, if he encountered it, would feel justified in following it up, or developing it, from the reasonable expectation of finding paying mineral as the result of his developing the vein; so that mere water cracks or seams in the native rock or a mere stringer or offshoot, would not necessarily constitute a discovery. In other words, if there was not enough found to justify a practical miner in entertaining a reasonable hope of finally encountering paying mineral in this particular crevice or vein, by developing or following it, then what was found would not be a discovery in law,—would not justify a location,—and any location made thereon would be invalid.* And this discovery must be so made before the boundaries are marked, for a location void when made, for want of ‘*sufficient discovery*’ as above defined, could not be made good by the locator afterwards finding what would be in law considered a good discovery.”

The court afterwards stated and elaborated the plaintiffs’ contention by the following instruction: “The plaintiffs insist that the ground was open to location in May, 1891, for these reasons: First, while admitting the marking of the boundaries and record of the Silver Safe in December, 1889, they say that there was not, by Brooks or his co-locator, before they marked their boundaries, any such discovery as the law requires, i. e., as a *practical miner* would have felt justified in developing, with the reasonable expectation of finally finding paying mineral in *that particular seam*. They also insist that the persons claiming under the Silver Safe claim abandoned their claim in the fall of 1890, and tried to secure the ground under a different location, called the Rush placer or stone quarry claim; and they further say that the Silver Safe claimants forfeited their claim, if any they ever had, by failing to perform one hundred dollars’ worth of work or improvements on and for the benefit of the Silver Safe location in the year 1890.”

In the use of words (*italicized by us, for better illustration*) restricting a discovery to such a crevice or vein as a practical miner alone would have felt justified in developing, with the reasonable expectation of finally finding paying mineral in that particular seam, the court clearly erred. The error was not alone in laying down a rule limiting a valid discovery to such as a *practical* miner would feel justified in developing, with reasonable expectation of finding ore of commercial profit, present or prospective, but extended as well to the language of the charge which limited such justification to the expectation that paying mineral would be found in *that particular seam* upon which a discovery was made.

The statutes of the United States (Rev. St. §§ 2319, 2320), and the interpretations placed upon them by the supreme court, so far as we are advised, have never required as a prerequisite to the location of a mining claim that a locator discover rock in place bearing any of the precious metals named in the statute sufficient to justify persons pursuing any particular phase of any particular occupation in life only, as distinguished from any others, in expending time and means in prospecting and developing the ground within the limits of the location.

Any person may become a prospector by exploring a region of country for mineral; any person qualified by reason of citizenship in the United States may make a valid location of a mining claim by compliance with the law; and if the rock discovered by such a person is in place, and carries enough precious metal in it to justify the locator in expending his time and money in prospecting and developing the ground located, such a discovery is valid, and a location thereof may be made, no matter what the locator's vocation may be. The law does not discriminate. Its justification to locate extends to any citizens complying with its requirements; not only to the miner, whose experience lies in years of toil, but to the geologist, whose life has been in books of science, and to any other citizen, regardless of his calling.

When the validity of a mining location is assailed upon the

ground of no sufficient discovery, and there arises a question of whether the locator was justified in expending his time and money in prospecting and developing the ground located, then, of course, the testimony of mining men, including practical and scientific miners, geologists and mineralogists, is most valuable, to the end that the court and jury may correctly determine if the locator has made a discovery of rock in place carrying precious metal sufficient to warrant his expending time and money in prospecting and developing his located ground. Such testimony fixes the character of the rock, the nature of the vein or seam or crevice, the formation of the country about, whether there is a well-defined wall or not, the probabilities of the result of future development work, and in other material ways assists the court or jury in arriving at a just conclusion as to the existence or nonexistence of the facts plainly essential as bases for such justification. But, if the justification is found, it is a justification to the locator by reason of the existence of facts, mineralogical and geological; while, if such facts exist, the justification exists, and whether or not it is such a justification as the *practical* miner would avail himself of is not of vital import.

We find in the case of *Book v. Mining Co.*, 58 Fed. 106, a discussion of what constitutes a "discovery" within the meaning of the United States statute. More than ordinary respect is due to the opinion because it is rendered by Judge Hawley, who enjoys in a peculiarly high degree the respect of the courts and bar alike for his great learning upon the law of mining rights. We quote as follows from the opinion:

"What constitutes a discovery of a vein or lode, within the meaning of the statute? Section 2320, Revised Statutes, provides that 'mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations and laws in force at the date of their location. A mining claim located after the tenth day of May, 1872, whether located by one or more persons, may equal, but shall

not exceed, 1,500 feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located.' The words, 'vein or lode,' in the last clause of this statute, were evidently intended to apply to such veins or lodes as were described in the first section, and to have the same meaning, viz. a vein or lode 'of quartz or other rock in place bearing gold, silver,' etc. The statute was intended to be liberal and broad enough to apply to any kind of lode or vein of quartz or other rock bearing mineral, in whatever kind, character, or formation the mineral might be found. It should be so construed as to protect locators of mining claims, who have discovered rock in place bearing any of the precious metals named therein, sufficient to justify the locators in spending their time and money in prospecting and developing the ground located. It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts, the veins, lodes, and ore deposits are so well and clearly defined as to avoid any question being raised. In other localities, the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place bearing mineral is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location. Every vein or lode is liable to have barren spots and narrow places, as well as rich chimneys and pay chutes, or large deposits of valuable ore. When the locator finds rock in place containing mineral, he has made a 'discovery,' within the meaning of the statute, whether the earth or rock is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

It will be observed that throughout the language of Judge

Hawley he does not establish any standard of judgment by which to warrant a justification, except the existence, and expected existence, of geological or mineralogical facts from which certain reasonable conclusions are authorized to be drawn. The probable conduct of the *practical* miner or his beliefs are not regarded as rules or tests of the justification for the guidance of locators. Indeed, throughout his whole succinct and carefully considered statement of the law, as quoted, the learned judge does not use the word "miner" at all, but lays stress upon the liberality of the statute, which protects the locator in his discovery and location if rock in place is found containing precious metals, sufficient to justify such *locator* in prospecting and developing the ground located.

Nor must the discoverer expect to find paying mineral in that particular crevice or vein or seam in which he finds his rock in place bearing metal, before he can make a valid location. This is plain by a study of Judge Hawley's opinion, by the law generally, and by the light of common knowledge. If a prospector in a mining region discover a seam with a well-defined wall, bearing indications of mineral sufficient to justify him in spending his time and money in following it, in expectation of finding a main body of ore of commercial value within the ground located, a valid location of a mining claim may be made, and the expectation need not be confined to finding paying mineral in the *particular* seam upon which the discovery is made.

Judge Beatty, of Idaho, in *Railway Co. v. Migeon*, 68 Fed. 811, after quoting from *Book v. Mining Co.*, *supra*, said that the late decisions establish "the liberal rule that it is not necessary, to the location of a valid claim under section 2320, that ore of commercial value in either quantity or quality must first be discovered within its limits. While the practical observer will commend this rule, it must be reasonably applied. To apply it to every seam or fissure which may be filled with matter containing traces of the precious metals, whether in or remote from mineral country, whether valuable or worthless as a mining claim, would be a perversion of a

liberal law. The vein or lode which the statute directs must be discovered before the location of a claim, must be one that, from all its indications, has a present or prospective commercial value, for only 'lands valuable for minerals' are subject to appropriation as mineral claims."

The case at bar well illustrates the force of these views. It is in evidence that in the vicinity of the Silver Safe location, at Neihart, the veins increase as they go down; that the seams (sometimes called "stringers" in that district) are regarded as in close proximity to larger veins of mineral; that they are usually supposed to lead to veins, but sometimes lead from them; that in that camp some ore-producing mines, particularly one large producer, were only two or three inches wide in their main veins at the surface. This evidence tends to show that the district is one where the mineral is found in seams "the precise extent and character of which cannot be fully ascertained, until expensive explorations are made, and the continuity of the ore and existence of the rock in place bearing mineral is established." (*Book v. Mining Co., supra.*)

Oftentimes, in such districts, a discovery is made on a "seam," a term often used synonymously with "stringer," and commonly understood by miners to be a crack or crevice filled by mineral deposit, and occurring in the country rock, and by means of which the prospector anticipates being led to an ore body or deposit of commercial value. Upon such a seam the evidence in this case tends to show the Silver Safe discovery was made, and, if so made, the location thereof was valid in law.

The pleadings do not positively aver an abandonment of the defendants' location, but testimony was introduced upon that point, and instructions were given covering the law of abandonment. Whether it is necessary to specially plead abandonment we will not decide. The latest utterance of the supreme court of California, citing earlier cases, is in *Trevaskis v. Peard* (March, 1896) 44 Pac. 246, where it was held that evidence of abandonment may be given without a special

plea under a denial of title. Where, however, abandonment is relied upon, it is safer to plead it.

The appellants complain that the instructions assumed that certain testimony was given which was not. Without going into any discussion of the instructions complained of, we think that, under our practice, courts should avoid any statement of testimony so framed as to subject the instructions to any well-founded charge of being the court's conclusion from facts directly disputed on the trial.

The defendants' objection to the form of the verdict could not have operated to their prejudice in this action.

Judgment and order denying a motion for a new trial reversed, and cause remanded, with directions to grant a new trial.

Reversed.

PEMBERTON, C. J., concurs.

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GASSERT, ADMINISTRATRIX, APPELLANT, v. NOYES ET AL., RESPONDENTS.

[Submitted March 23, 1896. Decided May 4, 1896.]

EVIDENCE—Lost instrument.—Evidence of the contents of a lost bill of sale or deed from the administrator of plaintiff's predecessor in interest was properly excluded where it did not appear that the grantor in the instrument was an administrator, or that he had authority to execute the paper.

WATER RIGHTS—Abandonment—Non user.—Mere lapse of time is not alone sufficient to establish abandonment of a water right through non-user. (*McCauley v. McKetg*, 8 Mont. 369, cited.)

SAME—Abandonment—Evidence.—Abandonment is a mixed question of intention and fact, and where the defendants, grantors of a ditch and water right had not used it for a period of three years, prior to conveying it, it is competent for them to testify as to their intention in not using it.

SAME—Change of place of use by prior appropriator.—A prior appropriator of water cannot change the place of use of his water so as to deprive a subsequent appropriator of his rights, and therefore, where, at the time of the junior appropriation, the prior appropriator was returning the water used by him to the stream above the point of diversion by the latter, he will not be permitted to afterwards change his place of use so as to return the water to the stream below such point.

Appeal from Second Judicial District, Silver Bow County.

ACTION to determine priority of water rights. The cause was tried before McHATTON, J. Defendants had judgment below. Reversed.

Statement of the case by the justice delivering the opinion.

This action was instituted by Harry Gassert, in his lifetime, to determine the right to the use of the waters of Brown's gulch and its tributaries, in Silver Bow county, between the parties to this suit. Since the appeal, Harry Gassert has died, and Sarah C. Gassert, administratrix of his estate, has been substituted as plaintiff.

The plaintiff claims the prior right to the use of 300 inches of the waters of said stream and its tributaries. It seems from the record that the ditch plaintiff claims was constructed in 1866; and the waters of the stream and its tributaries in controversy were appropriated and used by and through this ditch ever since by plaintiff, and others before him. In 1872, plaintiff first acquired possession of this ditch by purchase from Chris. Nissler, administrator of one Nurenberg. In 1875, the plaintiff, to perfect his title to the use of the water of said stream, appropriated 300 inches thereof, which he used in and by the ditch constructed in 1866, and which he had used since 1872.

The grantors of defendants constructed their ditch in 1868. This ditch taps Hail Columbia, Bull Run and Oro Fino Gulches, the principal tributaries of Brown's Gulch, and conveys the waters thereof onto a mining claim, known as the "Oro Fino Placer Ground," where it is used for mining purposes. The water, being used on the Oro Fino placer ground, was returned by way of Oro Fino Gulch to Brown's Gulch, above the head of plaintiff's ditch, and was afterwards used, or could be used, by him for irrigation purposes, through his ditch. In 1872, the reservoir on Hail Columbia Gulch, owned by defendants, broke. After that, the waters claimed by defendants' grantors and their ditch were not used for any purpose until 1876, when the defendants purchased the ditch and

water right, and commenced again to use the waters on the Oro Fino placer. In 1878, defendants extended their ditch so that they could use the water on placer ground near Rocker. The use of the water at this point prevented it from returning, after being used, to Brown's Gulch, as it did when used on Oro Fino placer. The plaintiff at once, it seems, notified the defendants that he claimed a prior right to 300 inches of the waters of Brown's Gulch and tributaries, and forbade their diverting it from Brown's Gulch so he could not use it. It appears that there was no scarcity of water for all parties until 1888, when the dry season made it necessary for plaintiff to assert his prior right to the use of the water, by instituting this suit.

The case was tried to a jury. The jury made a number of special findings of fact, that will be noticed, as far as necessary, in the opinion. A general verdict for the plaintiff was also found by the jury. On motion, the court set aside the findings of fact made by the jury, and the verdict, and made findings of its own, and, on its own findings, rendered judgment for the defendants. From the judgment and order refusing a new trial plaintiff appeals.

Shropshire & Burleigh and Robinson & Stapleton, for Appellant.

Forbis & Forbis, for Respondent.

PEMBERTON, C. J.—The action of the court in excluding the evidence of the contents of a lost bill of sale or deed from Chris. Nissler, as administrator of Nurenberg, to plaintiff, of the ditch called the "Gassert Ditch," and claimed by plaintiff, is assigned as error. It did not appear that Nissler was administrator of Nurenberg, or, if he was, that he had any authority to execute the lost paper. We think there was no error in the action of the court.

The jury found that the grantors of the defendants abandoned their ditch and water right in 1873, by failing to use the same during the years 1873, 1874 and 1875. The court

set aside this finding, and made a finding of its own, that there was no such abandonment. This action of the court is assigned as error. There was no evidence of non-user of the water for any greater length of time than the three years named. Mere lapse of time is not alone sufficient to establish abandonment. (*McCauley v. McKeig*, 8 Mont. 389; *Partridge v. McKinney*, 10 Cal. 181; *Moon v. Rollins*, 36 Cal. 333; *Judson v. Malloy*, 40 Cal. 300; Black's Pom. Water Rights, page 184.)

Abandonment is a mixed question of intention and act. The grantors of defendants testified that they had no intention of abandoning their water right during the three years they did not use it. During that time one of the grantors purchased the interest of one of his co-owners in the ditch and water right. It was competent for these witnesses to testify as to their intention in this regard. (11 Am. & Eng. Ency. of Law, page 377, and authorities cited.) We think the court was justified in setting aside the finding of the jury, that the grantors of defendants had abandoned their ditch and water right in 1873, and making its own finding, that there was no such abandonment.

The jury found that the plaintiff had a right prior to that of the defendants to the use of 250 inches of the water in controversy. The court set aside this finding, and found that the right of the defendants to the use of 300 inches of the water was prior to that of plaintiff. The court found that plaintiff's appropriation was made in 1875, and that the grantors of defendants made their appropriation in 1868. From 1868 to 1878 the defendants and their grantors had used the water appropriated by them in mining on placer ground in Oro Fino Gulch. After the water had been thus used, it was permitted by the defendants and their grantors to return by way of Oro Fino Gulch to Brown's Gulch, at a point above the plaintiff's ditch, so that plaintiff could use it through his ditch in irrigating his lands. In 1878 the defendants extended their ditch from the point on Oro Fino Gulch, where their water had been used for ten years, to a point near Rocker, on the other side of the ridge or hill between Silver Bow Creek and

Brown's Gulch. It is conceded that by extending the ditch through the ridge or hill between Brown's Gulch and Silver Bow Creek, to the point near Rocker, and thereby conveying the water to that point, it became impossible for it to be returned to Brown's Gulch, but that it escaped into Silver Bow Creek after being used near Rocker. Thus, it appears that by extending their ditch and changing the place of the use of the water from the point where it was used when plaintiff made his appropriation, and long prior and subsequent thereto, the defendants absolutely deprived the plaintiff of the right to use the water in controversy at all.

The question then is, had the defendants the right to so change the place of the use of the water in controversy as to deprive the plaintiff entirely of the use thereof? Upon this point the court instructed the jury as follows: "The owner of the water right has the right to change the point of diversion, or the place or manner or use of the water, as he or they may see fit and proper provided the rights of other appropriators are not interfered with by such change; and in this case you are instructed that if the defendants were the owners of the waters of the tributaries of Brown's Gulch, and were using the same upon their placer grounds, that they might change the place of use, so that the water, instead of flowing into Brown's Gulch, would flow into Silver Bow Creek." The giving of this instruction is assigned as error.

In *Water Co. v. Powell*, 34 Cal. 109, a case involving the question under consideration, Mr. Justice Sawyer says: "But suppose the plaintiff appropriated the waters, and constructed its ditch and dam amply sufficient, under the condition of the stream and the country as it then existed, to make it available, and acquired a right to appropriate and use said water in the manner adopted, and to the extent of the appropriation, this would not prevent other parties from acquiring rights in the surplus water, or in the bed and banks of the stream, or in the adjacent lands, to any extent which should not interfere with the rights before acquired. And, when the rights of the subsequent appropriators once attach, the prior appropriator can-

not encroach upon them by extending his rights beyond the first appropriation. In this case the plaintiff appropriated the waters of Sandy Creek; constructed its ditch and dam for the purpose of conveying it away for the uses contemplated; and the mode of use, so far as anything to the contrary appears by the testimony, was sufficient, in the then condition of the stream, to enable the plaintiff to enjoy the waters in the most advantageous manner. It does not appear that plaintiff acquired any rights or made any claim beyond this. If plaintiff's right was thus limited to the extent and mode of the actual appropriation,—and from the mere fact of appropriation and enjoyment to a certain extent, and in a particular manner, no presumption of law arises that the right is more extensive than is indicated by the actual appropriation and mode of enjoyment,—then the defendants had a right to take up the mining claims on the stream above, and work them in any manner which would not encroach upon the rights of the plaintiff, as they were actually vested and enjoyed at the time of locating such mining claims. To that extent, they themselves would be the first appropriators, and, being first in time, would be first in right. * * * The legal presumption from these facts alone would rather be that the right was no more extensive than the present enjoyment. The limitation of plaintiff's right to its actual enjoyment at the time being assumed, the defendants were authorized to take up mining claims on the stream above, and hold and work them in the condition in which they found them, so far as they could do so without injury to the plaintiff's prior rights; and, after their rights became vested, the plaintiff could not rightfully construct a dam at a point further up the stream, and thereby flood the defendants' claims, which were not affected by the full enjoyment of the water rights of the plaintiff, as they existed at the time of the location of said claims; nor could the same results lawfully be accomplished by erecting a dam of much greater height than the old one at the point where it was before located. The latter mode of encroachment is as clearly illegal and wrongful as the former. * * * Un-

doubtedly, when plaintiff took up the water, and before other conflicting interests had vested, the right to the water carried with it the right to construct such works as were necessary to the full enjoyment of the water. But when it established its works, and fully appropriated the water by means sufficient for the purpose, and used it for a term of years in a particular mode, unless there was something manifesting a more extended right, other parties had a right to suppose that the plaintiff had itself defined the limits of its rights, and act accordingly."

In *Proctor v. Jennings*, 6 Nev. 83, a similar case, the court says: "Priority of appropriation, where no other title exists, undoubtedly gives the better right. And the rights of all subsequent appropriators are subject to his who is first in time. But others coming on the stream subsequently may appropriate and acquire a right to the surplus or residuum. So the rights of each successive person appropriating water from a stream are subordinate to those previously acquired, and the rights of each are to be determined by the condition of things at the time he makes his appropriation. So far is this rule carried that those who were prior to him can in no way change or extend their use to his prejudice, but are limited to the rights enjoyed by them when he secured his. Nor has any one the right to do anything which will, in the natural or probable course of things, curtail or interfere with the prior-acquired rights of those either above or below him on the same stream. The subsequent appropriator only acquires what has not been secured by those prior to him in time. But what he does thus secure is as absolute and perfect and free from any right of others to interfere with it as the rights of those before him are secure from interference by him." (*Ortman v. Dixon*, 13 Cal. 34; *Eddy v. Simpson*, 3 Cal. 349.)

In *Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co.*, 49 Fed. 430, after collating and discussing the cases and authorities bearing upon the question here involved, the court holds that "the appropriator of water to be used at a specified place, for the purpose of operating machin-

ery and other works, after so using and returning to its original channel, cannot change the place of use to the damage of a subsequent appropriator lower down on the stream.”

In *Creek v. Waterworks Co.*, 15 Mont. 121, this court held an appropriator of water could change the use of his appropriation. But in that case we also held that the first appropriator could not so change the use as to deprive subsequent appropriators of rights acquired by them.

The facts of the case at bar, we think, bring it squarely within the rule announced in the authorities quoted and cited above. It will not be disputed, we think, that a prior appropriator of water cannot so change the use of the water as to deprive the subsequent appropriator of his rights. If the prior appropriator cannot encroach upon the rights of the subsequent appropriator by changing the use, we think, for the same reasons, he cannot do so by changing the place of the use. This view, we think, is in accordance with the authorities, as well as reason and justice.

We think the instruction complained of is in direct conflict with the authorities and views herein expressed. We are therefore clearly of the opinion that the instruction is erroneous. The instruction is certainly in conflict with the spirit, reason, and holding of *Creek v. Waterworks Co.*, *supra*. To hold that the prior appropriator of water has the unrestricted right to so change the use, or the place of use, of water appropriated by him, as to wholly deprive subsequent appropriators of their right, is to subject the important question of water rights and irrigation in this state to the baleful influence of monopoly, which appears to us dangerous to private rights, and inimical to public policy.

The judgment and order appealed from are reversed, and the cause remanded for new trial.

Reversed.

HUNT, J., concurs. DE WITT, J., not sitting.

HOFFMAN ET AL., RESPONDENTS, v. BOARD OF COUNTY
COMMISSIONERS OF GALLATIN COUNTY ET
AL., APPELLANTS.

[Submitted April 10, 1896. Decided May 4, 1896.]

COUNTIES—Constitutional limit of indebtedness.—Illegal bond issue.—A loan of \$30,000 by a bank to a county, made in one day by splitting the sum loaned into several amounts of \$10,000 or less, each, is an attempted evasion of section 5, Article XIII of the constitution, prohibiting a county from incurring an indebtedness for any single purpose to an amount exceeding \$10,000, without the approval of a majority of the electors thereof voting at an election for that purpose; and a bond issue to fund the indebtedness so created, together with other legal warrants, is void.

SAME—Action to enjoin illegal bond issue.—Sufficiency of complaint.—A complaint in an action to enjoin the issuance of bonds by a county, which alleges, in effect, that the board of county commissioners pretended to borrow a certain sum from a bank at one time and in four several amounts, issuing warrants therefor, in order to create an apparent warrant indebtedness of the county; that the amounts were treated as loans for which the bank filed its claims; that at the time of the issuance of the pretended warrants there was no money due said bank, but that it was then agreed between the county and the bank that said warrants represented only a pretended loan deposited to the credit of the county and which should not be drawn against unless a sufficient amount of bonds were sold to take up said warrants; that upon the second day after the allowance of the claims the commissioners made an order for the issuance of bonds to fund the outstanding warrant indebtedness and for the publication of notice thereof; that the question of issuing the bonds was never submitted to the electors and that they were not issued to redeem outstanding bonds, states a cause of action.

SAME—Same—Answer.—Where the answer in such case admitted the making of the agreement pleaded in the complaint, but averred that it was abandoned prior to the commencement of the action, this is an admission that such an agreement was in force when the warrants were drawn, and a denial that the board of commissioners at any time created any fictitious indebtedness is inconsistent therewith and evasive. (*Power v. Gum*, 6 Mont. 5; *Stewart v. Budd*, 7 Mont. 573; *State v. Dickerman*, 16 Mont. 278, cited.)

SAME—Same—Judgment on pleadings.—The complaint in such case having charged a pretended loan for \$30,000, and that the warrants were issued as the basis for a bond issue with which to fund the loan, judgment on the pleadings was proper, where the answer identified the warrants as described in the complaint, but failed to specifically deny that the whole transaction was a loan of \$30,000, and that it was the sums making up that amount which, added to the legal outstanding warrants, made up the total indebtedness alleged in the answer.

SAME County commissioners.—Illegal bond issue.—Remedy of tax payers.—Where county commissioners undertake to incur an indebtedness against the county which is unconstitutional, this is not an exercise of administrative discretion in a matter within their jurisdiction, requiring a review by appeal under section 764, Fifth Division of the Compiled Statutes, providing that any one aggrieved by the action of the commissioners may appeal to the district court, but is a void act which may be restrained by injunction.

COUNTY COMMISSIONERS.—Injunction to restrain delivery of illegal bonds.—Diligence.—An injunction to restrain a bond issue for the purpose of funding warrants illegally issued will not be denied for want of diligence where the warrants were issued March 15th and the action was commenced May 28th and before the delivery of the bonds.

SAME—Same—Parties defendant.—In an action by tax payers against the board of commissioners to enjoin the delivery of bonds illegally issued and sold, the banks which had purchased the warrants and bonds are not necessary parties defendant.

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SAME—Same—Parties plaintiff.—An action to enjoin the delivery by the county commissioners of bonds illegally issued and sold, and to have the proceedings of the board declared void, is properly brought in the name of the plaintiffs as tax payers. (*Davenport v. Kleinschmidt*, 6 Mont. 502, cited.)

SAME—Same—Appeal.—Where the county treasurer is made a party defendant in such action with the commissioners, and defaults, the commissioners cannot, on appeal, complain of the judgment rendered against him from which no appeal was taken.

Appeal from Ninth Judicial District, Gallatin County.

ACTION by tax payers to enjoin the county commissioners, clerk and treasurer, from issuing bonds. Decree was entered for the plaintiffs below by W. S. HARTMAN, Esq., special judge. Affirmed.

Statement of the case by the justice delivering the opinion.

The complaint, after alleging that the plaintiffs are taxpayers of Gallatin county, avers that three of the defendants are members of the board of commissioners of Gallatin county, that the defendant Vaill was and is county clerk, and that defendant Chrisman was and is county treasurer. It is then alleged: That on or about March 13, 1894, the board of commissioners wrongfully and unlawfully, on the faith of Gallatin county, pretended to borrow from the Commercial Exchange bank, at Bozeman, for the pretended use of said county, the sum of \$30,000, and to issue therefor the pretended warrants of said county, which said warrants said bank pretended to accept, in the said amount of \$30,000, on the funds of the county. That said warrants were so pretended to be issued upon a pretended order of the board of county commissioners made and entered on the commissioners' journal on March 13, 1894. That at the time of the pretended issuance of said pretended warrants there was not, according to plaintiffs' information and belief, any sum of money due, or to become due, to said bank from Gallatin county, and said bank did not then or ever pay, or promise to pay, any sum of money for or on account of such warrants, or either of them; and no moneys whatever, on account of said warrants, have at any time or in any manner been placed in the hands or at the disposal of the treasurer of the county.

That, on the contrary, it was then and there mutually agreed between the commissioners and the bank that said warrants were issued for, and represented only, the pretended sum of \$30,000 pretended by said bank to be then and there deposited by itself, with itself, to the credit of said county, and the said warrants were not to, and should not, draw any interest, and that said money so pretended to be paid therefor by said bank, and so pretended to be deposited in said bank, should not, nor should any portion thereof, be drawn against by said county, or paid out by said bank, except on the condition, and in the event alone that the board of commissioners would and should thereafter issue bonds of Gallatin county in an amount sufficient, and realize upon the sale thereof a sum sufficient, to pay and take up said warrants.

That the question of borrowing the said sum of \$30,000 was never submitted to the electors of the county. That the board of commissioners, in pretending to borrow the said sum of \$30,000, and issuing warrants therefor, did so for the purpose of creating a fictitious indebtedness, in the sum of \$30,000, against the county, upon which to base an issue of bonds.

That on March 15, 1894, the legal outstanding warrants and orders of Gallatin county, for which the county was liable, did not exceed \$17,000, and were drawn upon and were standing against the several funds of the county in the following manner, to-wit: Against the contingent fund, \$3,000; against the road fund, \$7,000, against the bridge fund, \$4,000; and against the general fund \$4,000. That Gallatin county has no legal outstanding bonds now due, or soon to become due. That, notwithstanding the outstanding legal orders or warrants of Gallatin county did not and do not exceed \$17,000, the board of commissioners on March 15, 1894, ordered that the commissioners of Gallatin county issue, on the credit of the county, coupon bonds to the amount of \$45,000, bearing 6 per cent. interest, payable semi-annually, and to bear date the first day of May, 1894, redeemable in 20 years after May 1, 1894, and ordered the county clerk to give notice of the sale of such bonds as required by law, and that the said bonds be sold to the highest bidder as provided by law.

That the county clerk gave notice as ordered, and on May 1, 1894, the board of commissioners awarded the sale of said bonds to the Farmers' & Mechanics' Savings Bank, of Minneapolis, Minn., and then and there wrongfully and unlawfully ordered said bonds to be prepared, executed, and to be delivered to said bank; and the defendants are about to and will deliver said bonds, in accordance with above order, unless restrained by the court. That the commissioners never submitted the question of issuing said bonds to a vote of the electors, and that the bonds so about to be issued are not intended to be issued for the purpose of redeeming any part or portion of the outstanding bonds of the county. That the said proposed execution, issuance, and delivery of said bonds is without authority of law, and that said bonds, if so issued, would become, in the hands of an innocent purchaser, a legal and binding obligation against the county, and greatly increase the burden of taxation thereof, and that the plaintiffs have no plain, speedy, and adequate remedy at law.

The plaintiffs prayed for an order enjoining and restraining the defendants from issuing or delivering the bonds, and that all proceedings taken by the board of commissioners towards the issuance of said bonds be adjudged null and void, until further relief, and for a temporary restraining order.

The defendant board of commissioners demurred to this complaint on the ground that the court had no jurisdiction of the persons of the defendant commissioners, or of the subject-matter of the action, and upon the further ground that there was a defect of parties defendant, in that the Farmers' & Mechanics' Savings Bank of Minneapolis was not made a party, but was a necessary party to the complete determination of the issues, and also upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and that the plaintiffs have no legal capacity to sue, in that it does not appear that the consent of the attorney-general of the state, or of the county attorney of Gallatin county, was obtained to bring this action. This demurrer was overruled, and thereupon the county commissioners filed their answer.

They deny that the commissioners wrongfully or unlawfully pretended to borrow any money from the Commercial Exchange Bank, or any other bank, for the pretended use of said county, in the sum of \$30,000. Deny that the board ever issued any pretended warrants to said bank, or ever issued any warrants except such as it was authorized to issue. Deny that any warrants were ever issued by the board as set forth in the complaint, or accepted by the bank as averred therein. Deny that the board pretended to make any pretended order as set forth in the complaint, on March 13, 1894, or at any other time, but admit that there were numerous and various orders of said board made on the said 13th day of March, 1894, and spread at large on the commissioners' journal; but the defendants aver that there were no warrants whatever issued on March 13th to said Commercial Exchange Bank, or in pursuance of any order made or entered in said commissioners' journal, as set forth in the complaint, on March 13, 1894. Deny that at the time of the issuance of certain warrants on the treasury of Gallatin county, payable to the Commercial Exchange Bank, there was no money due or to become due to said bank from the county. Deny that there was no consideration for the said warrants, or any of them. Admit that the commissioners and the bank made and entered into the agreement mentioned and described in plaintiffs' complaint, substantially, but the same was, prior to the bringing of this action abandoned by the parties thereto. Deny that said warrants or any warrants issued to the bank, represented the pretended sum of \$30,000, or any other pretended sum, and deny that it was ever agreed between the bank and the board of commissioners that said warrants, or any of them, were not to draw interest. Deny that the board ever deposited, or had on deposit, any money belonging to the county with said bank, or that said bank ever deposited any money by itself, or with itself, to the credit of the county, under any agreement whatsoever. Deny that under any agreement the bank received any deposits of money from the board at any time. Deny that the board ever or at all borrowed, or pretended to borrow, from

the bank, or became indebted for any single purpose to said bank to the sum of \$30,000, or in any other or greater sum than \$10,000. Deny that it was ever or at all agreed between the board and the bank that any money was represented by said warrants, or either of them. Deny that the bank paid any money for said warrants, but admit that certain warrants were drawn, payable to said bank, for debts due and owing from the county to said bank. Deny that any warrant was issued to said bank in any greater sum than \$10,000, or that the county was ever indebted to said bank for any single purpose, in any sum to exceed \$10,000. Deny that on March 15, 1894, the legal outstanding warrants or orders of the county, or for which the county was liable, did not exceed \$17,000, but aver that the legal outstanding warrants or orders of the county on that date amounted in the aggregate to at least \$45,000. Deny that the legal outstanding warrants or orders at the time said complaint was filed did not exceed \$17,000, but on the contrary, aver that said warrants and orders were in excess of \$51,000. Deny that there was ever any fictitious indebtedness created for any purpose whatever.

The defendants then set forth that there was a misjoinder of parties defendant, in that the Commercial Exchange bank, the owner of the warrants claimed to be illegal, and the Farmers' & Mechanics' Savings Bank of Minneapolis, the owner of the bonds in controversy, are not defendants, and are necessary parties to the full determination of this suit. The defendants then plead in bar (a) that on March 14, 1894, Gallatin county was indebted to the Commercial Exchange Bank, at Bozeman, in the sum of \$10,000, which was then due and unpaid; (b) that a duly itemized account, verified and prepared as required by law, was presented to the board on March 14, 1894, and was duly and regularly examined, settled and allowed to said bank, as an account properly chargeable against the county, for the sum of \$10,000; (c) that thereafter a county order for said \$10,000 in favor of said bank, in payment of said account, was signed and delivered to said bank;

(d) that neither the plaintiffs nor other taxpayers have ever or at all, since the 14th day of March, 1894, served any notice of appeal on the board from the allowance or decision of the board to the district court, although the proceedings of the board were duly published, and plaintiffs were aware of the allowance of the account; (e) that said order so drawn is one of the warrants which were funded by said board of commissioners as set forth in plaintiffs' complaint.

As further answer and plea in bar, the defendants allege an indebtedness to the said bank in the sum of \$2,500, and set forth that an account for said sum of \$2,500 was duly presented to the board, and allowed, and a county order for said sum delivered, and that no appeal was taken, and that this warrant for \$2,500 is one of the warrants which was funded by the board as set forth in plaintiffs' complaint.

It is next alleged that the county was indebted on March 14, 1894, to the same bank, in the further sum of \$10,000, and that an account was duly presented for this sum, and allowed, and a warrant therefor delivered, and that this warrant was one which was funded by the board, as set forth in the plaintiffs' complaint.

It is next alleged that on the same 14th day of March, 1894, the county was indebted to the same Commercial Exchange Bank in the sum of \$7,500, which was then due and unpaid, and that an itemized account for said sum was duly presented to the board, and a warrant therefor drawn and delivered to said bank, and that no appeal from the action of the board was taken, and that the said warrant is one of the warrants funded by said board, as set forth in plaintiffs' complaint.

The defendants then plead that all these warrants upon said allowed accounts were all warrants issued to said Commercial Exchange Bank at the March, 1894, meeting of the board of commissioners, and were regularly and legally outstanding on March 15, 1894, and, together with numerous other warrants of said county, aggregated on said date the sum of \$45,000; that in order to redeem said \$45 000 of legal, outstanding warrants and orders, the bonds mentioned in the plaintiffs'

complaint were ordered to be issued, and notice of the selling of the same was given as required by law; that thereafter, on May 1, 1894, sealed proposals were opened by the board of commissioners, and the Farmers' & Mechanics' Savings Bank of Minneapolis, Minn., being the highest and best bidder, the board of commissioners duly and regularly sold said bonds to said bank, and said bank has since May 1, 1894, been the owner of said bonds, and entitled to the possession thereof; that said bank, in pursuance of the contract of purchase of said bonds, in part payment, on May 1, 1894, paid to Gallatin county \$1,000, and has delivered to said county blank printed forms of coupon bonds, and nothing remains to be done upon the part of the county, to consummate said sale, except the ministerial act of signing, sealing, and delivering said bonds to said bank, which has been at all times ready and willing to receive them, and to pay therefor the balance due upon the purchase price; that said \$45,000 worth of bonds were sold to said bank at par value and \$2,526 premium; that the plaintiffs took no action in relation to said warrants or bonds until long after said bonds had been sold by the county to the bank, and after the rights of the bank had intervened herein; that said bonds were sold and issued under the provisions of Chapter 40. Fifth Division of the Compiled Statutes of Montana, and the acts amendatory thereof, and the bonds and other indebtedness of the county do not exceed the constitutional limits of indebtedness of said county; that, when said bonds were ordered issued, neither of said warrants drawn payable to the order of said bank had been paid, nor had any of said \$45,000 of indebtedness, and on May 1, 1894, when said bonds were sold to the said Farmers' & Mechanics' Savings Bank of Minneapolis, there were over \$45,000 of warrants and orders registered and not paid for want of funds, and bearing interest at the rate of 7 per cent. per annum; that the said Farmers' & Mechanics' Bank is entitled to have said bonds signed, sealed and delivered without let or hinderance of the plaintiffs and by reason of the facts in the answer set forth, it is averred that the said county of Gallatin, and the citizens of the county

are barred and estopped from questioning the validity of said bonds.

The defendants further aver that on March 15, 1894, the board found that there were \$45,000 of warrants outstanding, due and owing, and legally issued, against said county, and that the said bonds mentioned in the plaintiffs' complaint, and the whole thereof, were to be, and were, issued in lieu of, and to take up, said outstanding orders of said county to an amount equal to the amount of said bonds, which said commissioners had full authority to do, and, having jurisdiction thereover, are not subject to the control or discretion of the court, to be by it restrained in the lawful exercise of such authority or discretion.

Defendants ask that the court decree that the Farmers' & Mechanics' Savings Bank be entitled to the bonds, and for further relief.

The plaintiffs moved for judgment on the pleadings, for the reason that said answer does not state facts sufficient to constitute a defense or counterclaim, and that said answer is sham and irrelevant, and does not raise any issues. This motion for judgment on the pleadings was sustained. The commissioners refused to further amend their answer, while the defendant Chrisman, county treasurer, defaulted. It was then ordered that the temporary restraining order be made perpetual, and that the board of commissioners and the county clerk be restrained from executing, or delivering to the Farmers' & Mechanics' Bank, or to any bank or person, the bonds described in the complaint; and the commissioners, county clerk and treasurer were restrained and enjoined from in any manner executing, selling or delivering any bonds of said county on account of said \$30,000 of warrants issued to the Commercial Exchange Bank, complained of in plaintiffs' complaint.

The board of commissioners and the county clerk appeal from the judgment, and from the order thereof.

Sanders & Sanders and *John A. Luce*, for Appellants.

1. When the board of supervisors heard and determined

the facts involved in the claim, and made their allowance thereof, it became *res judicata*, and in the absence of fraud, conclusive. (*McFarland v. McCowan*, 33 Pac. 113; *Waugh v. Chauncey*, 13 Cal. 11; *Fall v. Paine*, 23 Cal. 303; *County v. County*, 6 Mont. 151; *Tilden v. Sacramento County*, 41 Cal. 68; *Snelson v. State*, 16 Ind. 29; *Chicago & A. Ry. Co. v. Sutton*, 30 N. E. 291-293 and 294; *State v. Welover*, 127 Ind. 315, S. C. 26 N. E. 762; *Commissioners v. Gregory*, 42 Ind. 32; *Jackson v. Smith*, 120 Ind. 520-522, S. C. 22 N. E. 431; *Wood v. Bangs*, 46 N. W. 586; *McCoy v. Able*, 30 N. E. 528-530-531; *Holmes v. Stateler*, 57 Ill. 210; Elliott on Roads and Streets, page 222.) The action of a tribunal clothed with jurisdiction over a particular class of cases cannot be reviewed in a court of equity, except upon the ground of fraud and then only in a very restricted class of cases to which this action does not belong. (*United States v. Lint*, 4 Sawy. 51; *United States v. Throckmorton*, 98 U. S. 61-69.) Nor was any fraud such as would vitiate the decision of the board alleged or proved. (*Vance v. Burbank*, 101 U. S. 519; *Case of Broderick's Will*, 21 Wall. 503; *Cragin v. Powell*, 128 U. S. 698; *French v. Fyan*, 93 U. S. 169; *Maxwell's Land Grant Case*, 121 U. S. 380; *Ableman v. Rooth*, 12 Wis. 81; *Stokes v. Knarr*, 11 Wis. 407; *Wilkinson v. Rewey*, 59 Wis. 554; *Riddle v. Baker*, 13 Cal. 296.) A court of equity is not in any sense a court of review. The action of the special tribunal authorized to hear and determine certain matters arising within the course of its duties is final and its enforcement can not be enjoined. (*Johnson v. Townsley*, 13 Wallace 12; *Tilton v. Co-field*, 93 U. S. 163; *Parmeter v. Bourne*, 35 Pac. 588; *Rogoss v. Cummings Co.*, 54 N. W. 683; see *Holmes v. Steele*, 28 N. J. Eq. 173; *Cairo R. Co. v. Titus*, 12 C. E. Green (N. J.) 102; *Vanarsdalen v. Whitaker*, 10 Phila. (Pa.) 153; Black on Judgments, § 378.)

II) By far the most serious objection to the maintenance of this action is that a plain, speedy and adequate remedy exists by appeal, from the decision of the board. This remedy has never been pursued. An allowance of an account in the

absence of such appeal is conclusive and equity will not intervene by way of injunction to prevent the collection of the warrants issued upon such allowance. (*Picotte v. Watts*, 31 Pac. 805; *State ex rel., Norcross v. Medical Board*, 10 Mont. 162; *Argo v. Barthoud*, 80 Ind. 63; *County of Knox v. Montgomery*, 9 N. E. 917; *Black on Judgments*, § 363; *High on Injunctions*, § 165; *Brewer v. R. R. Co.*, 113 Mass. 52; *Martin v. Supervisors of Green Co.*, 29 N. Y. 645; *El Dorado v. Elstner*, 18 Cal. 144; *Dixon Co. v. Barnes*, 13 Neb. 294; *Colusa Co. v. De Jarnett*, 55 Cal. 373; 10 Am. & Eng. Ency. of Law, 901 and cases cited; *Fleming v. Munn*, 61 Miss. 603; *County of Greene v. Daniel*, 102 U. S. 187.)

III. Plaintiffs not only neglected to appeal but stood by during the whole period of the advertisement of the sale of the bonds before making any attempt to right their alleged wrongs. Merits and diligence must be shown. (*High on Injunctions*, § 114; *Black on Judgments*, §§ 378-387 and cases cited; *Riddle v. Baker*, 13 Cal. 296-305; *Fleming v. Munn*, 61 Miss. 603; *Smith v. Phinizy*, 71 Ga. 641; *Hanna v. Morrow*, 43 Ark. 107; *Phelps v. Peabody*, 7 Cal. 50; *Agard v. Valencia*, 39 Cal. 292.)

IV. The board having found, on the 15th day of March, 1894, that there was \$45,000 of legal warrants outstanding this decision can not be inquired into in a collateral manner as by an injunction. (*Porter v. Purdy*, 29 N. Y. 110; *Van Stenberg, v. Bigelow*, 3 Wend. 42; *Bigelow on Estoppel*, 154.)

V. Even if the board in borrowing money as alleged in plaintiff's complaint acted without authority, it was under a solemn obligation to repay it and if it did not do so the county was liable to be sued for money had and received. (*Louisiana v. Wood*, 102 U. S. 294; *Argenti v. City of San Francisco*, 16 Cal. 256; *Chapman v. Douglass County*, 107 U. S. 348; *Pimental v. The City of San Francisco*, 21 Cal. 352; *Hitchcock v. Galveston*, 96 U. S. 341; *Waitz v. Ormsby County*, 1 Nev. 370; *Morville v. American Tract Society*, 123 Mass. 129; *Clark v. Saline County*, 9 Nev. 516; 2 Greenleaf on

Evidence, § 117.) The action of the board constituted a complete estoppel on the county and each of its citizens. (*Bank of California v. Shaber*, 55 Cal. 322; *San Francisco Gas Light Co.*, 62 Cal. 581.)

VI. These bonds being funding bonds and the power to issue them being expressly conferred their validity can not be questioned, even if the warrants which they are to take up are illegal. Neither was there any necessity to submit the question of their issue to a vote of the electors as the power is expressly conferred by the statute. (*County of Jasper v. Ballou*, 103 U. S. 745; *President, Etc., of Town of Keithburg v. Frick*, 34 Ill. 405; *Chandler v. The Town of Attica*, 18 Fed. 302; *Orleans v. Platt*, 99 U. S. 676; *Hill v. Peekskill Savings Bank*, 101 N. Y. 490; *Little Rock v. National Bank*, 98 U. S. 308; *Blanton v. McDowell Co.*, 101 N. Car. 532; *Lyons v. Munson*, 99 U. S. 684; see, also, 15 Am. & Eng. Ency. of Law, 1263-1264; *County of Greene v. Daniel*, 152 U. S. 182.) The acts of the officials of the county within the scope of their authority bind the county. (*Bernards Township v. Morrison*, 133 U. S. 523; *Orleans v. Platt*, 99 U. S. 682; *County of Roy v. Vansycle*, 96 U. S. 675; *Commissioners of the County of Knox v. Aspinwall*, 21 How. 539.) The rights of third parties have intervened and it is too late to set up the claim now interposed. (*Butler v. Dunham*, 27 Ill. 474; *Ford v. Cartersville*, 87 Ga. 213.)

VII. The banks were necessary and proper parties. (*Hutchinson v. Burr, et al.*, 12 Cal. 103; *Patterson v. The Board of Supervisors of Yuba County*, 12 Cal. 106; *Hays v. Hill*, 17 Kan. 361; *Bingham v. Campden*, 29 N. J. Eq. 465; *Butcher v. Camden*, 29 N. J. Eq. 478; *Calwell v. Prindle*, 11 W. Va. 309; *Denison v. League*, 16 Tex. 399; *O'Shea v. Twohig*, 9 Tex. 336.)

Cockrill & Pierce, for Respondents.

I. The transaction was an attempt by the commissioners in a round-about way to raise \$30,000 by issuing bonds of the county. This was an attempt to do indirectly that which

could not be legally done directly. (*State v. Commissioners*, 21 Kan. 436.) The only authority given county commissioners in this state to borrow money is in subdivision 4 of section 756, page 844 Compiled Statutes, which reads as follows: "To apportion and order the levying of taxes as provided by law, and to borrow money upon the credit of the county, a sum sufficient for the erection of county buildings, or to meet the current expenses of the county in case of a deficit in the county revenue." The constitution provides, "No county shall incur any indebtedness or liability for a single purpose to an amount exceeding \$10,000 without the approval of the majority of the electors thereof, voting at an election to be provided by law." —(Art. 13, Sec. 5.) The constitutional provision above cited limits the amount for each purpose to \$10,000, unless submitted to the electors of the county. Hence, the warrants issued for the \$30,000 would be for illegal charges against the county, and void. County warrants, if illegal when issued, are illegal for all time. (*People v. Super. Eldorado Co.*, 11 Cal. 171; *Linden v. Case et. al.*, 46 Cal. 172.) Municipal corporations, in making contracts, must act within the limits and observe the regulations prescribed, else there will be no contract. (*Lebcher v. Commissioners of Custer Co.*, 9 Mont., 320.) No subsequent act on the part of a corporation can cure the defect. Issuing the warrants on a non-authorized contract will not cure the defect. The powers of the officers to make a contract may always be inquired into. (*Leavenworth v. Rankin*, 2 Kan., 371.) Unless the commissioners had authority to borrow money in the manner attempted, conferred upon them by the legislature, the issuing of warrants therefor or on account thereof, is null and void. (*Waitz v. County*, 1 Nev., 370; *State v. County*, 14 Nev., 66; *Foster v. Coleman*, 10 Cal., 279; *Linden v. Case*, 46 Cal., 172; *People v. Super.*, 11 Cal., 171; *Murdock Co. v. Spencer*, 37 Pac., 483, Cal.) When the provision of the constitution above quoted was adopted, it will be presumed that the framers had in view said paragraph 4 of section 756. The courts have not the power

to add to or take from the language used in such constitutional provisions, but must construe the same literally, and in the light of all the circumstances under which it was incorporated in the constitution. (*Lake Co. Commissioners v. Rollins*, 130 U. S. 662; *People ex. rel. v. Baker*, 83 Cal. 149; *People v. May*, 12 P. R. 840; *Crampton v. Zabriskie*, 101 U. S. p. 601; *Smith Canal Co. v. City of Denver*, 36 Pac., 844, Cal.; *Lavo et. al. v. People, ex. rel.*, 87 Ill., 385.)

II. The attempted denials in the answer are general denials; denials of conclusions of law; literal denials, or denials that are evasive; hence they are sham and irrelevant. (*Doll v. Good*, 38 Cal., 290; *Stuart v. Budd*, 7 Mont., 578; *Power v. Gum*, 6 Mont., 5; *Sands v. McClay*, 2 Mont., 35; *Blankman v. Vallejo*, 15 Cal., 639; *Woodman v. Knowlton*, 22 Cal., 164; *Sanders v. Bolton*, 26 Cal., 394.) Neither the Commercial Exchange Bank nor the Farmers' & Mechanics' Savings Bank are necessary or proper parties. (*Kleinschmidt v. Davenport*, 6 Mont., 524.)

III. Section 764, Fifth Division Compiled Statutes, does not limit remedy to appeal, but gives only an additional remedy. Section 744, Fifth Division Compiled Statutes, provides that a county "may sue and be sued;" hence, when a party feels aggrieved by the decision of the commissioners, he may appeal or bring action against the county. (*Commissioners of Leavenworth Co. v. Brewer*, 9 Kan., 319; *Trumbull Co. v. Hutchings*, 11 Ohio, 368, *Price v. County*, 6 Cal., 255; *Waitz v. County*, 1 Nev., 370; *State v. Board of Commissioners, et al.*, 14 Nev., 67; 68 Am. Dec., 297, note.)

IV. The plaintiffs are not estopped by the act of the commissioners. "The wrongful acts of the officers of a municipal corporation cannot create an estoppel against the corporation, or taxpayers, or people." (15 Am. & Eng. Ency., 1211 and 1292; *Mayor etc. v. Ray*, 19 Wall., (U. S.) 468.) It matters not if the rights of third parties intervene. All persons contracting with the officers of a municipal corporation are charged with notice of such officer's authority. (*Lebcher v. Commissioners Custer Co.*, 9 Mont., 320.) If \$30,000 of the

bonds threatened to be issued were illegal the entire issue should be restrained. Notice must be given of the amount. (Comp. Stat. Sec. 810, p. 859; *State ex. rel. v. School Dist.*, 38 P. R., 462; *People v. Baker*, 83 Cal., 149.)

HUNT, J.—The substance of the plaintiffs' complaint is that the board of county commissioners of Gallatin county pretended to borrow \$30,000 from the Commercial Exchange Bank of Bozeman, and issued warrants therefor in order to create what appeared to be a warrant indebtedness of Gallatin county to said bank. The amount of this apparent debt, when added to the amount of legal outstanding warrants aggregated over \$45,000. To create this apparent additional debt of \$30,000, the board of county commissioners pretended to borrow the money in several amounts,—two of \$10,000 each, one of \$7,500, and one of \$2,500. It appears by the complaint that these amounts were all treated as loans, for which the bank filed its several claims or accounts as claims against counties are usually presented. The board allowed each and every claim, and ordered warrants to be issued to the bank. Upon the second day after the allowance of these apparent claims of the bank for \$30,000, the commissioners made an order for an issue of bonds of the county in the sum of \$45,000, to fund the outstanding warrant indebtedness, and ordered notice of said sale of such bonds to be published. The question of issuing said bonds was never submitted to the electors, and it is alleged that the bonds are not issued to redeem any part of the outstanding bonds of the county.

The facts pleaded stated a cause of action; for, if it be true that the commissioners were not authorized by law to borrow \$30,000, by way of loan, without the approval of the electors, no evasion by which the letter and spirit of the law are violated will be sustained by the court, when a proper case is presented. "Counties, cities and towns are municipal corporations created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the constitution of the state otherwise provides.

Beyond doubt, they are, in general, made bodies politic and corporate, and are usually invested with certain subordinate legislative powers, to facilitate the due administration of their internal affairs, and to promote the general welfare of the municipality. They have no inherent jurisdiction to make laws or to adopt governmental regulations, nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the state." (*Commissioners of Laramie Co. v. Commissioners of Albany Co.*, 92 U. S., 307; *Lebcher v. Commissioners of Custer County*, 9 Mont., 320.)

The constitution (article XIII § 5) provides that "no county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars (\$10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law." This is a general limitation upon the power of county boards, inhibiting their right to incur any debt or liability for one purpose only, in excess of \$10,000, without the approval of the majority of the electors voting as may be provided by law. For the exercise of the power within this limited authority the legislation pertinent to the subject may be quoted. The board of commissioners have power "to apportion and order the levying of taxes as provided by law, and to borrow money upon the credit of the county, a sum sufficient for the erection of county buildings, or to meet the current expenses of the county in case of a deficit in the county revenue." Subdivision 4, § 756, Division 5, Compiled Statutes 1887. There was, therefore, in the Compiled Statutes, an expressed recognition of two accounts for which a county might borrow money,—one, to erect county buildings; the other, to meet current expenses in case of a deficit in the county revenue.

The compiled laws of 1887, § 795, also provided that the board of county commissioners should not borrow money for the purposes specified in the statute just hereinbefore quoted,—that is, either to erect county buildings, or to meet current expenses in case of a deficit—without having first submitted

(d) that neither the plaintiffs nor other taxpayers have ever or at all, since the 14th day of March, 1894, served any notice of appeal on the board from the allowance or decision of the board to the district court, although the proceedings of the board were duly published, and plaintiffs were aware of the allowance of the account; (e) that said order so drawn is one of the warrants which were funded by said board of commissioners as set forth in plaintiffs' complaint.

As further answer and plea in bar, the defendants allege an indebtedness to the said bank in the sum of \$2,500, and set forth that an account for said sum of \$2,500 was duly presented to the board, and allowed, and a county order for said sum delivered, and that no appeal was taken, and that this warrant for \$2,500 is one of the warrants which was funded by the board as set forth in plaintiffs' complaint.

It is next alleged that the county was indebted on March 14, 1894, to the same bank, in the further sum of \$10,000, and that an account was duly presented for this sum, and allowed, and a warrant therefor delivered, and that this warrant was one which was funded by the board, as set forth in the plaintiffs' complaint.

It is next alleged that on the same 14th day of March, 1894, the county was indebted to the same Commercial Exchange Bank in the sum of \$7,500, which was then due and unpaid, and that an itemized account for said sum was duly presented to the board, and a warrant therefor drawn and delivered to said bank, and that no appeal from the action of the board was taken, and that the said warrant is one of the warrants funded by said board, as set forth in plaintiffs' complaint.

The defendants then plead that all these warrants upon said allowed accounts were all warrants issued to said Commercial Exchange Bank at the March, 1894, meeting of the board of commissioners, and were regularly and legally outstanding on March 15, 1894, and, together with numerous other warrants of said county, aggregated on said date the sum of \$45,000; that in order to redeem said \$45 000 of legal, outstanding warrants and orders, the bonds mentioned in the plaintiffs'

complaint were ordered to be issued, and notice of the selling of the same was given as required by law; that thereafter, on May 1, 1894, sealed proposals were opened by the board of commissioners, and the Farmers' & Mechanics' Savings Bank of Minneapolis, Minn., being the highest and best bidder, the board of commissioners duly and regularly sold said bonds to said bank, and said bank has since May 1, 1894, been the owner of said bonds, and entitled to the possession thereof; that said bank, in pursuance of the contract of purchase of said bonds, in part payment, on May 1, 1894, paid to Gallatin county \$1,000, and has delivered to said county blank printed forms of coupon bonds, and nothing remains to be done upon the part of the county, to consummate said sale, except the ministerial act of signing, sealing, and delivering said bonds to said bank, which has been at all times ready and willing to receive them, and to pay therefor the balance due upon the purchase price; that said \$45,000 worth of bonds were sold to said bank at par value and \$2,526 premium; that the plaintiffs took no action in relation to said warrants or bonds until long after said bonds had been sold by the county to the bank, and after the rights of the bank had intervened herein; that said bonds were sold and issued under the provisions of Chapter 40. Fifth Division of the Compiled Statutes of Montana, and the acts amendatory thereof, and the bonds and other indebtedness of the county do not exceed the constitutional limits of indebtedness of said county; that, when said bonds were ordered issued, neither of said warrants drawn payable to the order of said bank had been paid, nor had any of said \$45,000 of indebtedness, and on May 1, 1894, when said bonds were sold to the said Farmers' & Mechanics' Savings Bank of Minneapolis, there were over \$45,000 of warrants and orders registered and not paid for want of funds, and bearing interest at the rate of 7 per cent. per annum; that the said Farmers' & Mechanics' Bank is entitled to have said bonds signed, sealed and delivered without let or hinderance of the plaintiffs and by reason of the facts in the answer set forth, it is averred that the said county of Gallatin, and the citizens of the county

trary, were in excess of \$51,000. Let us, then, look at the affirmative answer. By it we learn that on March 14, 1894, the county was indebted to the Commercial Bank in the sum of \$10,000, "which was then due and unpaid;" that the said bank presented its claim for said sum, and the board settled and allowed the account as "properly chargeable against the county of Gallatin, for the sum of \$10,000," and thereafter, in payment thereof, a county order for said sum was signed, and delivered to the bank; and that the said order "is one of the warrants which were funded by said board as set forth in plaintiffs' complaint." Like averments are made in reference to three other warrants, all aggregating \$30,000. It is then alleged that these four warrants, making \$30,000, as drawn upon the bank's account, are all the warrants issued to the said bank in March, 1894, and, together with numerous other outstanding warrants, aggregated on March 15, 1894, the sum of \$45,000. Thus, the answer identifies the warrants as being accounts allowed to the bank aggregating \$30,000, as specified in the complaint. The warrants being thus identified, we look in vain for some statement in the defendants' pleading which specifically contradicts the complaint in its allegations of facts,—that the county commissioners, on the faith of the county, pretended to borrow from the bank the sum of \$30,000, and to issue therefor the warrants, pretended or otherwise, of the county.

We do not regard the use of the adjective characterizing the loan as a "pretended" one as important to the decision of this case. It signifies the legal view that the plaintiffs take of the conduct of the board, their contention being that because the loan was invalid, by reason of its being made to base a bond issue upon, and because not submitted to the electors, the whole transaction was, in law, an unreal and worthless one; while defendants, by their evasive answer, substantially insist that although the transaction was had, as alleged, still it was done by such a method and in such a form that it was not in excess of the legal powers of the board, hence was not pretended or worthless at law.

But how did these accounts of \$10,000, \$2,500 and \$7,500 become accounts "properly chargeable" against Gallatin county, all due and unpaid March 14, 1894? What facts made them the bases of properly chargeable accounts, unless they were included in the loan purported to have been made as charged in the complaint?

Whether accounts are properly chargeable against a county, under certain conditions, involves legal questions of considerable magnitude. But here the matter is solved by the pleadings. The complaint charges a pretended loan, and that the warrants were illegally issued to enable bonds to be sold to fund said loan. The answer not only affirmatively particularizes the warrants as correctly described by the complaint, but fails to specifically deny that the whole transaction was a loan of \$30,000 and that it was the sums making up this \$30,000, which, added to the divers other outstanding warrants made up the total outstanding debt of \$45,000 or more. The pleadings, therefore, raised no issuable facts. The board of commissioners stood before the court as having assumed to borrow \$30,000 in a single loan, and to issue warrants therefor, and as about to deliver bonds to fund this loan of \$30,000, without ever having submitted any question to the electors, and obtaining their approval of their action. Thus, whether the borrowing was in good faith, or was fictitious, we need not dwell upon. In either event, it was wholly beyond the power of the board to incur any such liability without complying with the constitution and the law. As was said in *Hefferlin v. Chambers*, 16 Mont. 349, 40 Pac. 787:

"If we were to sustain the proposition of appellants in this case, it would be to allow county commissioners to expend more than \$10,000, or incur an indebtedness or liability exceeding that sum, if they simply resorted to the evasion of dividing the total amount into several sums, each less than \$10,000, and expending each of said several sums, or incurring each of said several liabilities, at different times. Under such construction they could expend \$9,999 in each of several successive years, and the total of said amounts all for one pur-

pose. If they could do this in each of several successive years, why not in each of several successive months or days? It is clear that such conduct would be a gross violation of the constitutional provision, and that it was just such a violation as was contemplated by these appellants, and restrained by the district court."

We are cited to *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821. There the county commissioners were about to issue bonds to fund outstanding warrants. No question of a loan to create a debt upon which to base a bond issue entered into the case at all. The court decided that under such circumstances the issuance of the bonds changes the form of the indebtedness, and was not the creation of a new debt or liability, within the constitutional prohibition. The illegality of the debt was not involved.

The appellants devote much space in their briefs to the contention that the only remedy plaintiffs had was by appeal, under section 764, Fifth Division of the Compiled Statutes, from the action of the board in allowing the claims of the bank for the various sums aggregating \$30,000. We cannot agree to this. Whatever may be the rule where the party has a claim or account against a county, and attempts to prosecute an action in debt, or even in tort, we hold that where a taxpayer, by proper showing, asks an injunction to restrain county commissioners from consummating a sale of county bonds, based upon an unconstitutional act, relief should be granted. In such a case no exercise of discretion in a matter within the jurisdiction of the board arises. Having no jurisdiction to incur any indebtedness in excess of \$10,000, for any single purpose, without the approval of the electors, it followed in this case the board had no authority at all to make any such loan, or allow claims for any such loan, and their actions were a nullity. (*Carroll v. Siebenthaler*, 27 Cal. 193.)

High on Injunctions, § 1251, cites the following as the doctrine to be applied: "While it is quite true that the administrative discretion of the board in the business affairs of the

county cannot be reviewed by a court, yet when the board undertake to do an act unauthorized by law a court will enjoin them, and this is the proper remedy. Boards have an administrative discretion within the law, but none without or against it."

It is urged that plaintiffs were not diligent in instituting this action. The warrants were issued March 15th. Suit was commenced May 28th, and before the bonds were delivered. These dates at once contradict any suggestion of lack of diligence.

There is clearly no misjoinder—which means an excess—of parties. Nor was there a defect of parties. The action being by taxpayers against the commissioners, to restrain the delivery of the bonds, and declare the proceedings of the board null and void, we cannot see how it was necessary that the banks be made parties. If they have rights, they are not prevented from enforcing them by appropriate remedy. (Pomeroy's Code Rem. § 418; Boone on Code Pl., § 51.)

The action was properly brought in the name of plaintiffs as taxpayers. (*Davenport v. Kleinschmidt*, 6 Mont. 502.)

Defendants are in no position to complain because judgment was entered against Chrisman, treasurer. Chrisman did not appeal in his own behalf. The court was authorized to enter judgment on the pleadings, upon Chrisman's default.

Appellants object to the extent to which the judgment went, in enjoining the execution or delivery of the particular bonds described in the complaint, or any bonds of Gallatin county, on account of said \$30,000 of warrants issued to the Commercial Bank, complained of in the complaint. This relief extends no further than is necessary to protect plaintiffs, as taxpayers, against injury by issuing and delivering any bonds based upon the invalid warrants for \$30,000 issued by the board.

From the foregoing opinion, upon the various points presented and relied upon, it follows that the judgment of the district court must be affirmed.

Affirmed.

PEMBERTON, C. J., concurs.

HOFFMAN ET AL., RESPONDENTS, v. BOARD OF COM-
MISSIONERS OF GALLATIN COUNTY ET
AL., APPELLANTS.

[Submitted March 10, 1896. Decided May 4, 1896.]

See syllabus and opinion in *Hoffman v. Board of Commissioners of Gallatin County*, ante, page 224.

Appeal from Ninth Judicial District, Gallatin County.

ACTION to enjoin issuance of county bonds. Defendant's motion to dissolve the injunction was denied by ARMSTRONG, J.

Sanders & Sanders and *John A. Luce*, for Appellants.

Cockrill & Pierce, for Respondents.

PER CURIAM.—This appeal is from an order of the district court refusing to dissolve an injunction. The cause of action involves the conduct of the board of county commissioners in attempting to borrow the same \$30,000 referred to in the case of *Hoffman v. Board of Commissioners of Gallatin County*, ante, page 224, and the same warrants, and the threatened delivery of the same bonds. It is, in fact, substantially the same case.

The action of the district court in refusing to dissolve the injunction must be affirmed, upon the authority of the case (No. 678) above referred to.

Affirmed.

EMERSON, APPELLANT, v. ELDORADO DITCH COMPANY, RESPONDENT.

[Submitted March 20, 1896. Decided May 4, 1896.]

APPEAL—Time for taking—Review of errors in statement.—A statement on appeal containing the evidence and the exceptions saved by the appellant is a part of the judgment roll, and where no motion for a new trial is made, or appeal taken within sixty days, the errors alleged in the bills of exception, contained in the statement, may be reviewed on an appeal from the judgment taken within one year after the rendition thereof. (*Lockey v. Horsky*, 4 Mont. 468; *Twell v. Twell*, 6 Mont. 19; *Kleinschmidt v. Her*, 6 Mont. 128, reviewed and explained.)

SAME—Agreed statement part of judgment roll.—Where neither the testimony offered by the plaintiff and defendant is contradicted by the adverse party, the testimony before the court becomes virtually an agreed statement of facts, and as such is properly a part of the judgment roll. (*Hartman v. Smith*, 7 Mont. 19, cited.)

SAME—Directing verdict—Non-suit.—Where there is no conflict in the evidence and the court directs a verdict and decides the case either for plaintiff or defendant, this is equivalent to a judgment of non-suit and reviewable as such on appeal. (*McKay v. Montana Union Ry. Co.*, 18 Mont. 15; *Creek v. McManus*, 18 Mont. 152, cited.)

SAME—Ruling on non-suit—Review.—The ruling on a motion for a non-suit may be reviewed either on motion for a new trial or on an appeal from the judgment. (*Kleinschmidt v. McAndrews*, 117 U. S. 282, *McKay v. Montana Union Ry. Co.*, 18 Mont. 15, cited.)

SAME—Specification of error—Sufficiency.—A specification of error in the statement on appeal that "The court erred in overruling and denying plaintiff's motion for judgment at the close of defendant's case" is sufficient to permit a review of the ruling.

WATER DITCH—Right to construct—Eminent domain.—Section 1240, Fifth Division of the Compiled Statutes, conferring upon any person owning lands without available water facilities upon the same, an absolute right of way over the lands of others for the purpose of constructing ditches, does not by the mere force of its terms permit one to dig a ditch upon the lands of another, but permits the exercise of the right after proper proceedings in eminent domain.

SAME—Damages—Judgment.—Where the defendant constructed and maintained a ditch across the plaintiff's land without legal right to do so, causing damages by overflow, plaintiff was entitled to a judgment for the amount of damages claimed, where the defendant, on the trial, admitted that plaintiff was the owner of the land at the time of its appropriation of the water; that it had constructed the ditch without plaintiff's consent, and that the damage was to the extent claimed.

Appeal from Eleventh Judicial District, Teton County.

ACTION for damages for constructing and maintaining ditches across plaintiff's land. Judgment was rendered for the defendant below by Du BOSE, J. Reversed.

Statement of the case by the justice delivering the opinion.

Plaintiff's complaint is, in substance, that the defendant entered upon certain lands belonging to and in her possession,

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and, without any right, dug a ditch across the same and diverted water by means thereof from the channel of a certain stream; that defendant allowed the water from said ditch to overflow a meadow of plaintiff's said lands, causing injury to her hay crops to the extent of \$750; that defendant continues to maintain said ditch across said lands, and overflow plaintiff's lands. The relief prayed for is that the ditch be declared a nuisance, that defendant be prohibited and restrained from maintaining the same, and that plaintiff be adjudged to recover the damages aforesaid.

Defendant filed an answer, denying the allegations of the complaint, and setting up that prior to plaintiff's acquiring a title to the lands aforesaid, and while they belonged to the United States, it had dug and constructed the ditch complained of, and appropriated by means thereof a water right. Plaintiff filed a replication to the answer, denying its allegations. A jury was impaneled and sworn, and the trial commenced. One witness was called for the plaintiff, who testified as to the amount of damage caused by the overflow of the ditch. At this stage of the proceedings, defendant made a motion for a judgment on the pleadings. The court thereupon denied the motion for judgment on the pleadings, but took the case from the jury, and announced that judgment would be given for the defendant if it would prove that its water right had been appropriated to some useful purpose. To the court's action in taking the case from the jury, and its announcement as to the only issue on which testimony was to be heard, the plaintiff objected and preserved exceptions. Defendant then admitted that plaintiff was the owner of the land at the time of its appropriation of water, that it had constructed its ditch without her consent, and intended to use the same in the manner alleged, and that the overflow from said ditch had, as claimed, damaged her to the extent of \$750. Plaintiff rested.

Certain evidence was then admitted in behalf of defendant, most of it under objections and exceptions duly taken. This evidence, in substance, was to the effect that in the year 1883 certain persons had dug a ditch, and appropriated, by means

thereof, a water right, and that thereafter a corporation was organized, and the persons who had acquired the water right aforesaid conveyed the same to said corporation. There was nothing in this evidence to show that the persons who appropriated it owned any lands at the time of their appropriation, but it inferentially appears that these persons had made this appropriation for the purpose of reclaiming desert lands. The evidence further shows the stockholders in this corporation at time of the trial owned tracts of desert lands irrigated by means of the aforesaid ditch.

Plaintiff put in no evidence in rebuttal, and, at the close of defendant's testimony, moved the court for judgment. The court denied plaintiff's motion, and rendered judgment for the defendant. Plaintiff saved exceptions. There was no motion for a new trial. Plaintiff appealed some 11 months after judgment against her.

J. G. Blair and Ed. L. Bishop, for Appellant.

Ransom Cooper and John B. Clayberg, for Respondent.

PER CURIAM.—No motion for a new trial having been made, and no appeal having been taken within 60 days, the respondent contends that the statement on appeal does not present the evidence for review. In support of this contention, subdivision 1 of section 421 of the Code of Civil Procedure (Compiled Statutes Montana) is cited. It is as follows :

“An appeal may be taken, first, from the final judgment in an action or special proceeding commenced in the court in which the same is rendered within one year after the entry of judgment. But an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment.”

This section has been eliminated from the new Code of the state. In California, in connection with other sections of its statutes, it has a recognized function of its own, and there,

on an appeal taken within the 60-day limit prescribed, the trial evidence embodied in a statement on appeal can be reviewed, to ascertain whether it supports a verdict or decision. (See Hayne on New Trial and Appeal, the latter part of section 96, and section 258.) Before the adoption of the California Code, the rule under the old practice act of that state was that the question of the insufficiency of the evidence to justify a verdict or decision could be raised only after a motion for a new trial, and an appeal from the order in relation thereto. But the Code of California finally, by describing two kinds of exceptions, namely, exceptions to decisions upon matters of fact (see Code Civil Procedure California, §§ 647, 648; and Hayne, New Trial and Appeal, § 258), extended the scope of the mode of review of the insufficiency of evidence on appeal.

The new Montana Code of Civil Procedure (1895) in sections 1151 and 1152, includes the California (sections 647 and 648.) Section 290 of the Code of Civil Procedure (Compiled Statutes Montana) was identical with the California (section 647), but section 292 of said Code of Civil Procedure of Montana was as follows: "No particular form of exception shall be required. The objection shall be stated with so much of the evidence or other matter as is necessary to explain it, but no more, and the whole as briefly as possible."

Section 1152 of the new Montana Code of Civil Procedure is as follows: "No particular form of exception is required, but the grounds of objection shall be particularly stated, except as provided in the next preceding section, and when the objection is to the verdict or decision upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated with so much of the evidence taken from the stenographer's notes, or other matter, as is necessary to explain it, but no more. Only the substance of the reporter's notes of the evidence shall be stated or used as evidence. Documents on file in the action or proceeding may be copied or the substance thereof stated, or

a reference sufficient to identify them may be made when that will sufficiently present the objections and exceptions."

The new Code of this state, therefore, recognizes the two kinds of exceptions mentioned above. This is somewhat of a digression, but it is a matter of interest to practitioners.

If, by reason of the adoption of section 1152, of the Code of Civil Procedure of 1895, which is substantially the same as section 648 of the Code of Civil Procedure of California, and adds to section 292 of the Code of Civil Procedure (Compiled Statutes Montana,) it should be held in this jurisdiction that the sufficiency of the evidence to support a verdict or decision can be raised by a bill of exceptions, as well as on appeal from an order in reference to a new trial, the time in which an appeal could be taken would apparently be one year, instead of sixty days. This would result from the elimination from the new Montana Code of subdivision 1 of § 421, Code Civil Procedure (Compiled Statutes.)

We know of no case in Montana prior to the adoption of the Code of 1895, holding that evidence can be reviewed for the purpose of determining whether it supports a verdict or decision, without being embodied in a statement on motion for a new trial. The Montana decisions as to the review of evidence on appeal seem to have followed the decisions of California under the old practice act, and to be based wholly on section 296 of said Code of Civil Procedure (Compiled Statutes), which, in stating the grounds on which a new trial may be asked, in subdivision 6, says: "Insufficiency of the evidence to justify a verdict or other decision, or that it is against law." The force and effect of said subdivision 1 of section 421, and perhaps, also, section 290, of the Code of Civil Procedure (Compiled Statutes), was apparently ignored, in so far as the question of a review of the insufficiency of the evidence being had on an appeal from the judgment with a statement on appeal is concerned.

We will proceed to a discussion of the Montana decisions which respondent further relies upon to sustain its contention that no review of the evidence can be had in this case, because

there was no motion in the lower court for a new trial. The following are cited: *Allport v. Kelley*, 2 Mont. 343; *Chumassero v. Vial*, 3 Mont. 376; *Largey v. Sedman, Id.*, 472; *Broadwater v. Richards*, 4 Mont. 52; *Lockey v. Horsky*, 4 Mont. 457; *Territory v. Young*, 5 Mont. 245; *Twell v. Twell*, 6 Mont. 19; *Alder Gulch Mining Co. v. Hayes*, 6 Mont. 31; *Porter v. Clark*, 6 Mont. 246; *Blessing v. Sias*, 7 Mont. 103; *Lloyd v. Sullivan*, 9 Mont. 588; *Beatty v. Murray Placer Mining Co.*, 15 Mont. 314; *Kleinschmidt v. Iler*, 6 Mont. 122. Expressions in several of them are ambiguous, and, in order that their meaning may be made clearer, we will discuss them somewhat in detail. Their underlying principle is still a vital one, and by no means to be disregarded in interpretations of the exception, new trial, and appeal provisions of our recently adopted Code.

Section 295 of the Code of Civil Procedure (Compiled Statutes), which is retained in our new Code of Civil Procedure (section 1170) is as follows: "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referees."

It necessarily follows, from this definition, that the main purpose of a motion for a new trial is to obtain a re-examination, a re-determination, of an issue of fact, that is, a retrial to determine the existence or nonexistence of an alleged fact, which has been both asserted and denied. A new trial and a motion therefor, eliminating the idea of any mere question of law as applicable to facts, have to deal with a dispute in evidence, and an exception to a decision or verdict on a matter of fact. Bearing this in mind, a conception of what is meant by the term "insufficiency of the evidence to justify the verdict or decision" causes less difficulty. The question of the insufficiency of the evidence to justify the verdict or decision grows out of an issue, a conflict and dispute as to a fact, and it has nothing to do, save incidentally, with a fact conceded to exist actually or hypothetically, for the purpose of obtaining a ruling of law. Hence, where an objection is made to the admissibility of evidence, which is sustained or overruled, an excep-

tion being properly saved, the truth of the evidence offered must be assumed, on review of the error alleged, in connection with the ruling; and to hold that evidence presented to explain such an exception cannot be reviewed, unless contained in a statement on motion for a new trial, brought up in a transcript on appeal from the order denying or granting a new trial, would be absurd. Of course, when incompetent, or sometimes immaterial, evidence is admitted, or proper evidence erroneously excluded, on the ground of incompetency, irrelevancy or immateriality, and the right of a party is substantially impaired thereby, a new trial may be properly asked, under the statutes regulating new trials and motions therefor; and, if the request be granted, the verdict or decision on the conflict or issue of fact, previously unfairly arrived at by reason of the exclusion of proper evidence or the admission of improper evidence, be rectified. But because this is true it does not follow that the question of the admissibility or non-admissibility of evidence can only be considered and raised on an appeal from an order denying or granting a new trial.

If the substantial rights of a party to a suit have been materially affected by the admission of improper, or the exclusion of proper, evidence, only a question of law is presented for appellate review, and this review may unquestionably be had when a bill of exceptions, properly a part of the judgment roll, brings evidence up for the purpose. No question of the insufficiency, as that term is used in the statutes, arises as to the evidence. Of course, upon a review of the question as to whether evidence is admissible or not, the appellate court, even if satisfied that error has been committed, will never set aside a verdict or decision, unless satisfied that the party complaining of a ruling has been seriously affected by it. Unless this were true, the rule of review of exceptions of this character might be so liberally interpreted as to do away with any necessity of a motion for a new trial, and the saving of an exception to a decision or verdict on a matter of fact. This line of reasoning is applicable to several of the various other grounds on which a motion for a new trial may be based, but

it is not necessary to apply it specifically. The reluctance on the part of an appellate tribunal to review evidence as to its insufficiency to justify a verdict, and, as a corollary, a decision or findings of a trial court, as contradistinguished from its judgment, is based, to a large extent, upon the principle that jurors who render a verdict upon proper evidence, or even improper (which may be made proper by being unobjected to), are the judges of the truth or falsity or evidence in the determination of an issue of fact. But inasmuch as it is the province of the courts to instruct a jury as to what is the law in reference to facts found to be true, errors in law, however they may be blended with the ultimate determination of issues of fact, are peculiarly within the province of consideration by appellate tribunals, and, when found to be actually prejudicial to litigants, should always be corrected. Such correction in no way trenches upon the right to a trial of an issue of fact by a jury, and, though in the correction a new trial may often result incidentally, without the statutory interposition of a motion therefor, under such conditions, to adhere to a doctrine that error in law must first be embodied in a statement on motion for a new trial, and passed upon by a trial court, would be to ignore and impair the legitimate powers of the higher tribunal itself. Therefore, while there are many errors in law made proper grounds for a motion for a new trial, and reviewable upon appeals from the orders on such motion, these same errors are also independently cognizable by appellate tribunals.

The question presented on a motion for a nonsuit is one of law. The ruling on a motion for nonsuit may be reviewed either on motion for new trial, or on an appeal from the judgment. (Hayne on New Trial and Appeal, § 112; *Kleinschmidt v. McAndrews*, 117 U. S. 282; 6 Sup. Ct. 761; *McKay v. Montana Union Ry. Co.*, 13 Mont. 15.) Error in nonsuit may be reviewed by statement on appeal. (*Mercantile Co. v. Fussy*, 13 Mont. 401, *Gilliam v. Black*, 16 Mont. 217.) On motion for a nonsuit, everything the evidence tends to prove is assumed to be true on appeal. (*Herbert v. King*,

1 Mont. 475; *Gans v. Woolfolk*, 2 Mont. 463; *McKay v. Montana Union Ry. Co.*, 13 Mont. 15; *State ex rel. Pigott v. Benton*, 13 Mont. 306.)

In this review of an order granting or refusing a nonsuit is a clear illustration of the principle upon which the appellate court regards testimony, when an error of law in connection with it comes up for review. No question of conflict in evidence is presented; no question of "insufficiency," as that word is used in the statutes relating to a new trial. However, there are certain expressions in some of the cases respondent cites from which an inference might be drawn that exceptions to the admissibility of evidence can only be considered when embodied in a statement on motion for a new trial.

In the case of *Lockey v. Horsky*, 4 Mont. 463, we find this language: "And as to the error urged in the admission of improper evidence, there is no statement on motion for a new trial. It will be assumed that the court below proceeded correctly."

In *Twell v. Twell*, 6 Mont. 19, we find this language: "We have repeatedly held that the evidence could not be reviewed, unless brought here on a motion for a new trial. * * * The theory is that, before the testimony can be reviewed here, the lower court must have had an opportunity to have reviewed its own errors, and this, so far as the testimony is concerned, can only be done on motion for a new trial."

In *Kleinschmidt v. Iler*, 6 Mont. 123, we find this language: "If the appellant objected to the testimony, or any part thereof, for incompetency, and an exception had been saved before the referee, or for that the same did not support the findings, he ought to have made his objection and saved his exception before the rendition of the judgment, and then, by bringing the testimony before the court on motion for new trial, had these decisions and rulings reviewed. There was no motion for a new trial. * * * This court reviews the decision of the lower court, but that court must first have an opportunity to correct its own errors. * * * By taking

the proper action, and saving his objections as the law requires, he might have had all these questions—the competency of the evidence before the referee, its sufficiency to support the findings, the propriety of granting or refusing a motion for a new trial—reviewed and determined by this court.’’

But the language quoted from these cases does not justify the inference that the judges who used it intended to hold that errors of law arising from the admission or exclusion of evidence, or rulings on conceded facts, could not be reviewed unless presented in statements on motion for new trial. The expressions referred to were used inadvertently, and, from an inspection of the whole line of decisions *supra*, we are satisfied that the principle on which they were based was simply that no review of an issue of fact decided by a jury or trial court could be entertained, unless presented in a statement on motion for a new trial on appeal from an order granting or denying a new trial,—in other words, the question of the insufficiency of the evidence to justify a verdict or decision must have been directly raised by a strict compliance with the provisions of the statute regulating new trials, before it could be examined on appeal. There must have been a direct—not a collateral—attack on evidence, in so far as the insufficiency of it is concerned, before a review of it on that ground could be entertained. An exception to a decision or verdict upon a matter of fact, as distinguished from one on a matter of law, must have been saved as a condition precedent to such review.

The record on appeal in this case consists of the pleadings, the judgment, and a statement on appeal, containing the evidence and the exceptions saved by appellant. This statement on appeal is practically a part of the judgment roll. (See Hayne on New Trial and App. § 252.) The California statute which Hayne cites to show this was identical with section 436 of the Code of Civil Procedure (Compiled Statutes Montana), which is as follows: “A copy of the statement shall be annexed to a copy of so much of the judgment roll as shall be included in the transcript on appeal, if the appeal be from the judgment; if the appeal be from an order, to a copy of such

order." It is to be noted that said section 436 has not been carried forward into the new Code of this state.

The statement being a part of the judgment roll, the various bills of exceptions contained in it are now before us for review of the errors alleged therein.

There was no conflicting evidence before the trial judge when he rendered judgment for the defendant, the respondent here. The testimony offered by the plaintiff, the appellant, was uncontradicted, and admissions were also made by respondent in plaintiff's behalf. Nor was there any contradiction of the testimony offered by respondent, although it was admitted after numerous objections. The testimony before the court was virtually an agreed statement of facts. An agreed statement of facts properly belongs to the judgment roll. (*Hartman v. Smith*, 7 Mont. 19.)

Where there is no conflict in the evidence, and the court directs a verdict, and decides the case either for plaintiff or defendant, it is equivalent to a judgment of nonsuit, and reviewable as such on appeal. (*McKay v. Montana Un. Ry. Co.*, 13 Mont. 15; *Creek v. McManus*, 13 Mont. 152.)

The plaintiff, at the close of defendant's testimony, made a motion for judgment on several grounds, one of them being that "it had not been established that the defendant had ever become entitled to a right of way across the lands of the plaintiff." The specification of error in the statement on appeal is as follows: "The court erred in overruling and denying plaintiff's motion for judgment at the close of defendant's case." Respondent urges that this specification of error is not sufficient. We do not agree with the contention, and hold that it is. (See *Donahue v. Gallavan*, 43 Cal. 573.)

The undisputed facts show that defendant's predecessors in interest, constructed a ditch across the lands of the plaintiff without right or authority to do so, and that it (defendant) continues to maintain said ditch without the consent of the plaintiff, and without any legal right to do so. The evidence also fails to show that the original proprietors of the water right of defendant were the owners and holders of any land

which required irrigation at the date of their appropriation. The court in its decision no doubt had in view section 732, Revised Statutes Montana, 1879, which appears as section 1240, division 5, Compiled Statutes Montana, and which conferred the right upon any person, corporation, or company, owning or holding lands without available water facilities upon the same, an absolute right of way over the lands of others, for the purpose of constructing ditches, by which to appropriate water rights. Giving full force to said section, it cannot be seriously contended that, by the mere force of said statute, one person could go upon the lands of another, without his consent, and dig a ditch. Before such a right could have been exercised, it should have been definitely ascertained by a proper proceeding in eminent domain. As has been stated, the evidence of the defendant shows that it never acquired the right to dig the ditch over the plaintiff's lands, either itself or through its predecessors in interest. Plaintiff's motion for judgment at the close of defendant's testimony should have been granted.

There are other errors alleged and relied on by appellant, but the ground for reversal just stated disposes of the whole controversy, and it is unnecessary to enter into a discussion of them.

The judgment is reversed, and the cause is remanded, with directions to enter judgment for the plaintiff, as prayed for in the complaint.

Reversed.

DE WITT, J., being disqualified, takes no part in the foregoing decision.

RAY ET AL., APPELLANTS, v. COWAN ET AL., RESPOND-
ENTS.

[Submitted April 8, 1896. Decided May 4, 1896.]

APPEAL—New trial—Conflict in evidence.—Where there is a substantial conflict in the evidence as to the character of the contract sued on, an order granting a new trial will not be disturbed on appeal where no abuse of discretion appears.

Appeal from Second Judicial District, Silver Bow County.

ACTION to recover for services rendered. Plaintiffs had judgment below. Defendant's motion for a new trial was granted by McHATTON, J. Affirmed.

Statement of the case by the justice delivering the opinion.

Plaintiffs, who are partners, bring this suit to recover of the defendants commission for the sale of stock owned by defendants in the Silver Bow Hydraulic Mining Company. Plaintiffs allege that they were employed to effect a sale of defendants' stock in said company; that they did effect a sale thereof, for \$100,000 cash and 1,000 shares of the capital stock of a water company to be thereafter organized by the purchasers of said stock and others; that defendants agreed to pay them a reasonable compensation for making such sale; and that their services in the premises were reasonably worth \$10,000.

The answer denies all the allegations of the complaint, and alleges affirmatively that about the 1st of March, 1890, the plaintiffs were civil engineers, and that they (defendants) employed the plaintiff Ray to go east from Butte, to use his endeavors to effect a sale of their stock in said company to J. A. Cowan and others, for the sum of \$150,000 in cash; that they agreed to pay said Ray such compensation as was reasonable for civil engineers for the time he was absent on such business, and his expenses; that it was then agreed that said Ray should receive such compensation as a civil engineer whether

18	259
23	26

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18	259
41	439

such sale was made or not, and that it was no part of the contract that Ray should receive any commission whatever on said sale should it be perfected; that Ray's services as an engineer were reasonably worth \$15 per day for the time he was absent on said business, and his expenses. Defendants allege that they paid Ray \$150, and consent that plaintiffs may take judgment for \$415, the balance they claim is due for time and expenses of Ray while engaged in said business.

The case was tried with a jury. A verdict was rendered in favor of plaintiffs for \$5,000. The defendants made their motion for a new trial. This motion was sustained, and a new trial granted by the court. From the order granting a new trial, plaintiffs appeal.

Corbett & Wellcome and C. R. Leonard; for Appellants.

Forbis & Forbis, for Respondents.

PEMBERTON, C. J.—Counsel for appellants contend that the court below erred in granting the motion for a new trial. It is contended that there is no substantial conflict in the evidence, and that, therefore, the granting of a new trial was an abuse of judicial discretion on the part of the district court. This is the only error assigned.

This assignment renders it necessary to determine whether or not there is a substantial conflict in the testimony as to what was the contract between the parties concerning the compensation plaintiff Ray was to receive for his services in relation to effecting a sale of the stock of defendants mentioned in the statement. The complaint alleges that the plaintiffs were to receive reasonable compensation for effecting the sale of the stock.

The testimony of plaintiff Ray as to what the contract was is substantially as follows: "While out beyond the Germania mine, making some surveys, Mr. Cowan and Frank Leonard drove out, and Mr. Cowan asked me if I could go to Chicago that night, in connection with this business. I told him I was busy, and told him I did not think I could go. He

urged me rather, and said there was no one else who could go, and I finally consented. As we started to come up town, Mr. Cowan said he thought it was no more than right that we should have some understanding as to what it was going to cost them, and asked me what I was going to charge them. I told them that I could not say exactly; that I did not know whether I could do them any good, or whether I could do anything; and that it would depend entirely upon what I could do for them. * * * I think I added, 'I won't rob you.' This testimony is corroborated by witness Hughes.

On the other side, it appears that the plaintiffs are, and at the time of the contract were, civil engineers; that they had done work as such for defendants for \$15 per day, and expenses. Carter, a witness for the defendants, who was interested with them in the stock, and who was probably the first person who spoke to Ray about going east for defendants, testified that his proposition to Ray was that he (Ray) should go east for the defendants, "the same as if he had gone out in the field." Cowan (defendant) testified: "When I first engaged Ray to go east, he (Ray) said he could not afford to go and leave his work. I told him that we did not ask him to go for nothing, that we would pay him his time and expenses, and he then finally consented to go." Defendant Talbott testifies: "The understanding entered into at that time between us as to what Mr. Ray was going east for, and upon what terms, was this: He was to go east to take the profile of the work, and explain to these promoters what the cost would be of fetching that water in, and that we were to pay him his expenses and for his time. * * * Mr. Ray said he did not like to go, but he would go if we wanted him to, and would have to have expenses and time."

It appears from the record that the knowledge Ray had of the water ditches, sources and amount of water, capacity of the ditches, and the condition and value thereof, belonging to defendants, was acquired while Ray was in their employ as engineer. Ray, it is admitted, was to be paid his expenses and for his time whether the sale was effected or not. It also

appears from the evidence that negotiations were pending between the defendants and the purchasers of the stock before Ray was employed to go east to see them (the purchasers) in the interest of defendants, and that these negotiations had not been suspended.

We think there is a substantial conflict in the evidence as to what was the contract between the parties. The fact that Ray was to be paid his expenses and for his time whether a sale of the stock was made or not tends strongly, we think, to support the theory that Ray was not employed as a broker, but as a civil engineer, to go east to explain to the contemplated purchasers such matters and things in connection with the water ditches of the defendants as only a civil engineer could know, and which knowledge Ray acquired while in the employ of the defendants.

The counsel for the appellants contend that Ray's testimony as to what the contract was is not disputed. It is not perhaps disputed in *totidem verbis*; nor is the testimony of the defendants as to what the contract was so disputed. But the testimony of plaintiff tends to show a contract as to Ray's compensation. The testimony of the defendants tends to show a substantially different one. We think this condition of the evidence develops and constitutes a conflict as much as if every syllable thereof had been specifically contradicted.

Having determined that there is a substantial conflict in the evidence, and failing to discover any abuse of discretion in the action of the court in granting a new trial, in accordance with the many and uniform decisions of this court, the order appealed from must be affirmed; and it is so ordered.

Affirmed.

HUNT, J., concurs. DE WITT, J., not sitting.

LIGHT, APPELLANT, v. PRESSEY, ET AL., RESPONDENTS.

[Submitted May 6, 1896. Decided May 18, 1896.]

ACTION TO QUIET TITLE—Jurisdiction—Sufficiency of complaint.—In an action to quiet title by the holder of a tax deed, it is error for the court to refuse to consider the complaint on the ground that the facts alleged were not sufficient to confer jurisdiction, where the complaint was not attacked by demurrer, and it appeared that the action was not commenced until after the time for redemption had passed and that summons was regularly served.

Appeal from Seventh Judicial District, Custer County.

ACTION to quiet title. An order was made by MILBURN, J., refusing to entertain the action for want of jurisdiction. Reversed.

Statement of the case by the justice delivering the opinion.

Plaintiff pleads that he is the owner of lots 9 and 10 in block 66 of Miles City; that he became the owner of said lots on March 3, 1894, by tax deed duly made and executed, and delivered to plaintiff, by the treasurer of Custer county. The tax deed is made part of the complaint. It contains recitals to the effect that the property was assessed for 1891 to defendant Pressey, and that the tax levied for that year was \$12.75; that the taxes were not paid, and that the county treasurer in December, 1891, pursuant to law, published the delinquent list of the persons owing taxes to Custer county, which list included the lots involved; that the list was published as required by law, and that at public sale, held in manner provided by statute, on February 5, 1892, the said lots were sold to pay taxes, and that plaintiff was the bidder, and paid the full amount of taxes, costs, and charges, and became the purchaser of the lots aforesaid; that no one had redeemed the property within the time allowed by law for its redemption, and that the purchaser was entitled to a deed on and after February 5, 1894 (said date being two years after the date of the sale and of the certificate of sale); that the plaintiff, as

purchaser, 30 days' previous to applying for the deed, posted on the property described, as required by law, a written notice to the effect that the lots had been sold for delinquent taxes on February 5, 1892, and that the amount due was \$15.92 and interest, and that on February 5, 1894, the purchaser would apply to the treasurer for a deed; and that the plaintiff, as purchaser, filed the affidavit of the posting of the notices as required by law. The deed then witnesses that in consideration of \$18.92 the county treasurer grants, bargains, sells, and conveys unto the purchaser, and his heirs and assigns, forever, the property described.

It is next averred that the defendant county of Custer claims an interest by reason of a tax sale for the year 1891 for taxes of 1890, which claim was barred by the deed to plaintiff hereinbefore referred to; that notwithstanding said deed, and rights of plaintiff in the premises, the defendant Pressey claims an interest in said real estate. But, with reference thereto, the complaint alleges that all right, title, and interest of said Pressey to the said premises ceased and determined on the third day of March, 1894.

The prayer is that defendants be forever barred from all claim to any estate or inheritance, or freehold in said property. The record recites that the defendant Pressey had been regularly served and his default had been duly entered, according to law; that the cause came on regularly to be heard; that plaintiff appeared in person to offer proof to support the allegations of his complaint, but that the court refused to consider the said complaint upon the grounds that the facts in the said complaint alleged were not sufficient to confer jurisdiction upon the court, and that the court had no jurisdiction in the premises. To the refusal of the court to consider the complaint, the plaintiff duly excepted, and appeals from the order of the court in such refusal.

J. E. Light, for Appellant.

PER CURIAM.—The reasons why the district court was of opinion that it had no jurisdiction do not appear in the ruling

made, and are not pointed out by any brief or argument of the respondent. From an examination of the record, we believe there was jurisdiction.

It appears that the action was not commenced until the time for redemption was passed. Summons was regularly served. The district court has jurisdiction to hear and determine actions to quiet title to, or remove a cloud upon, a title to realty, and to render a judgment thereon. The plaintiff had a deed of the property sold, which, by section 132, p. 115, laws 1891, conveyed to him, as grantee, "absolute title to the lands described therein as of the date of the expiration of the period for redemption, free of all incumbrances except the lien for taxes which may have attached subsequent to the sale."

Perhaps the complaint is fatally bad, but, if so, it is not attacked by demurrer, and is not now for review by this court. The only question is, was the court correct in refusing to consider the case for want of jurisdiction? We do not detect any lack of jurisdiction upon the facts of the record.

The action of the court, refusing to consider plaintiff's complaint, must be reversed.

Reversed.

DE WITT, J., not sitting.

LARGEY, RESPONDENT, v. BARTLETT, AT AL., APPELLANTS.

[Submitted May 7, 1896. Decided May 18, 1896.]

ESTOPPEL—Agreement to convey interest in mining claim.—Where the owner of certain mining claims enters into a valid written agreement with another to convey to him a half interest in the claims upon the performance of certain conditions, and the latter performs such conditions, expending large sums upon the property, the benefits of which the owner receives, he will not thereafter be permitted to deny the existence of the claims or the validity of his own title thereto.

FRAUD—Principal and agent—Relocation of mining claim.—One occupying the fiduciary relation of a trusted agent, both of the defendant who was the owner of the mining claims in controversy and also of the plaintiff, who was entitled to a conveyance of a half interest therein, and who has full knowledge of the contract relations existing

between his principals, cannot, by availing himself of knowledge obtained in such capacity, defeat the rights of the plaintiff to a conveyance by an attempted relocation of the claims, sought to be accomplished by altering the names of the claims and the locators upon amended notices of location which he had posted for the benefit of his principals.

SAME—Same.—The fact that the agent in such case inserted the name of his wife as locator of the claims in question in attempting to relocate them, was a fraud against his principals and could not avail him or her as against the plaintiff.

SAME—Collusion in judgment quieting title—Equitable interest in mining claim.—In an action by the wife to quiet title to mining claims, which had been relocated in her name by her husband, while acting as an agent both for the owner and one having an equitable title to a half interest, the consent of the owner to appear and for the case to proceed, his refusal to file an answer and waiver of trial by jury, are evidences of collusion between himself and the plaintiff in such action to defraud the equitable owner of his interest in the claims, and a judgment so obtained will be annulled for fraud and collusion in an action brought for that purpose by the latter.

FRAUDULENT CONVEYANCE—Knowledge of fraud by grantee.—A deed made by the owner of the legal title to mining premises to a third person for the purpose of defrauding the plaintiff who owned an equitable interest in the property, and taken by such grantee, with knowledge of such interest is void as against the plaintiff.

APPEAL—Misjoinder—Answering over.—Questions as to misjoinder of parties and that several actions are improperly united will not be considered on appeal when the demurrer was not specific and the defendants answered after it was overruled.

Appeal from Fourth Judicial District, Missoula County.

ACTION to vacate a fraudulent judgment and to compel conveyance of an interest in mining premises. A decree was rendered for the plaintiff below by WOODY, J. Affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiff brought this action to have declared fraudulent and void the location of two mining claims, known as "Razor Back" and "Hardfoot," and to vacate and set aside as null and void a certain judgment obtained in the district court of the Fourth judicial district in a suit wherein Harriet A. Bartlett was plaintiff and George F. Bartlett, a defendant herein, was defendant, said judgment having been obtained in an action brought to quiet title to the mining claims aforesaid, in which said action the said Harriet Bartlett was by judgment of said court decreed to be the sole owner of said mining claims. Another purpose of the action was to require the said George F. Bartlett to execute to this plaintiff, Largey, a deed for an undivided one-half interest in all of the property described in the complaint, to wit, the two mining claims hereinbefore referred to; and for further relief.

The complaint alleges that on September 11, 1891, George F. Bartlett, the first defendant named herein, was the owner of two certain mining claims in Missoula county, known as the "Hardfoot" and "Razor Back" claims; that prior to September 11, 1891, Largey and George F. Bartlett made a written agreement, by the terms of which George F. Bartlett agreed, upon the performance of certain conditions, to be performed upon the part of Largey, to deed to Largey an undivided one-half interest in and to the said Razor Back and Hardfoot mining claims. Largey alleges the full performance of the conditions of the agreement on or before the said September 11, 1891. It is also alleged that J. H. Bartlett, the second defendant named was on September 11, 1891, and prior thereto in the employ of plaintiff, Largey, and the defendant George F. Bartlett, in making a survey of the Razor Back and Hardfoot lode claims preparatory to making application for a patent to said mining claims; that while the said J. H. Bartlett was so employed on said date he posted on said mining claims notices of amended location in the name of the defendant George F. Bartlett, and that within twenty days thereafter said George F. Bartlett verified said amended location notices, and duly filed them for record; that between the time when the location notices were posted upon the Razor Back and Hardfoot lodes and the time when the said notices of location were verified and recorded the said J. H. Bartlett returned to the mining claims, and erased the name of George F. Bartlett from said amended notices, and wrote in lieu thereof the name of Harriet A. Bartlett, his wife, as locator and claimant, and afterwards recorded the notices of location of said mining claims, changing the name of Hardfoot to Hazel, and that of Razor Back to Autocrat, and named his wife, Harriet, as locator and claimant.

It is also alleged that on February 18, 1892, Harriet A. Bartlett commenced the action referred to in the district court of the Fourth judicial district against George F. Bartlett, her brother-in-law, to obtain a decree of said court adjudging her to be the owner of said mining claims; that there was fraud

and collusion between J. H. Bartlett, Harriet A. Bartlett and George F. Bartlett in the commencement and prosecution of said action and in the entry of judgment in favor of said Harriet A. Bartlett against George F. Bartlett, and that said fraud and collusion were for the purpose of cheating and defrauding this plaintiff out of his half interest in and to said mining claims; that plaintiff, Largey, had no knowledge of said suit of Harriet A. Bartlett against George F. Bartlett, and that the said J. H. Bartlett and Harriet A. Bartlett had knowledge of the fact that plaintiff was the owner of an undivided one-half interest in all of said property, and entitled to a deed from the said George F. Bartlett therefor.

The defendant George F. Bartlett, by separate answer, pleads that prior to September 11, 1891, he believed himself the owner of the Hardfoot and Razor Back mining claims, but about that date was informed and advised that his title to the same was invalid. He denies that J. H. Bartlett was in his employ, except as a helper to the surveyor employed to survey the mining claims; denies the collusion and fraud alleged, and all acts in furtherance thereof, and alleges that upon learning of the relocation of said mining claims he informed plaintiff, Largey, thereof, but that plaintiff refused to take steps to protect his or George F. Bartlett's interests therein, and that, if any such steps were taken, it must be done without plaintiff's assistance; denies that plaintiff has ever performed the covenants and agreements entered into, or that he was entitled to a deed for any interest in the mining claims mentioned.

J. H. Bartlett and Harriet A., his wife, jointly answered, denying that George F. Bartlett was on September 11, 1891, or at any time, the owner of the mining claims described in the complaint; denying that J. H. Bartlett was ever in the employ of the plaintiff, or that he was for a long time prior to September 11, 1891, in the employ of George F. Bartlett, but averring that for a few days prior to that date J. H. Bartlett, at the request of his brother, George F., assisted a surveyor employed by George F. to survey the mining claims described

in the complaint. They also deny that J. H. Bartlett ever posted any notices of amended location in the name of George F. Bartlett, or notices such as are described in the complaint, and aver that the only notices posted by J. H. Bartlett were notices in which Harriet A. Bartlett appeared as locator; deny that at the time of the posting the notices of location J. H. Bartlett was the agent of George F. Bartlett or of the plaintiff, Largey, or in their employ; deny that J. H. Bartlett erased the name of George F. Bartlett from any location notice, or that he ever posted any notice with the name of George F. Bartlett appearing thereon; deny all collusion alleged, and allege that plaintiff had notice of the commencement of the suit by Harriet A. Bartlett against J. H. Bartlett, and that he abandoned the ground; deny that they had any knowledge of the transaction between George F. Bartlett and the plaintiff, or that plaintiff was at any time the owner of any part of the property mentioned; deny "on information and belief that the Hardfoot and Razor Back claims ever had any existence."

The plaintiff filed a replication denying abandonment and the averments of George F. Bartlett's answer to the effect that plaintiff refused to take any steps to protect his interest in the mining ground mentioned.

The case was tried to the court without a jury. The court made special findings, which may be stated, in substance, as follows :

(1) That George F. Bartlett, on September 26, 1890, was the owner of an undivided one-third interest in the Hardfoot lode, and of an undivided nine-tenths interest of the Razor Back lode.

(2) That on the 26th day of September said George F. Bartlett agreed in writing with the plaintiff, Largey, whereby, in consideration of the said Largey doing certain representation work, and expending certain money towards surveying and patenting of said lode claim, the said Bartlett agreed to convey to Largey an interest in the same, the interest in part to depend upon the success of the said Bartlett's efforts to ob-

tain the whole title of the said claim as contemplated by said agreement.

(3) That in pursuance of said agreement said George F. Bartlett had on July 16, 1891, procured the entire legal title to both said claims.

(4) That on the 11th day of September, 1891, Wilson, Cameron, and J. H. Bartlett, were in the employ of the plaintiff and George F. Bartlett for the purpose of surveying the said lode claims and doing whatever else might be necessary or proper to be done to enable the said Largey and George F. Bartlett to obtain patents, and in pursuance of said employment the said Wilson, Cameron, and J. H. Bartlett proceeded to make an amended location of said claims, by making a discovery valid in law, and by posting notice of location thereon on September 11, 1891.

(5) That on the 16th day of September, 1891, George F. Bartlett adopted and ratified the acts of the said Wilson, Cameron, and J. H. Bartlett, and made oath to the notices of amended location, and caused the same to be recorded on September 18, 1891, each of the said notices containing the name of the locator, George F. Bartlett, the date of location, and a reference to a natural object sufficient to identify the claim.

(6) That on February 4, 1892, the plaintiff had complied with all the covenants, promises, and agreements contained in the said written contract to be by him performed, and was entitled to a conveyance from George F. Bartlett of an undivided one-half interest in each of said claims.

(7) That on September 11, 1891, J. H. Bartlett, while employed by George F. Bartlett and the plaintiff, and purporting to act for his wife, Harriet A. Bartlett, fraudulently obliterated the name "Hardfoot" from the posted notice on the Hardfoot lode, and wrote instead the word "Hazel" as the name of the claim, and on the same day fraudulently obliterated the name "Razor Back" from the notice on the Razor Back claim, and wrote instead the word "Autocrat."

(8) That on and prior to September 10, 1891, J. H. Bartlett had actual notice of the contract existing between George

F. Bartlett and the plaintiff, whereby George F. Bartlett had agreed to convey to plaintiff a one-half interest in and to the Hardfoot and Razor Back claims.

(9) That prior to September 11, 1891, Harriet A. Bartlett also had notice of said contract.

(10) That on or about September 14, 1891, Harriet A. Bartlett made record of notice of location of the so-called "Hazel" and "Autocrat" claims.

(11) That about September 11, 1891, George F. Bartlett made a deed purporting to convey all his interest in the Hardfoot and Razor Back lodes to Harriet A. Bartlett.

(12) That Harriet A. Bartlett took the deeds with actual notice of the contract between the plaintiff and George F. Bartlett.

(13) That on the 18th day of February, 1892, Harriet A. Bartlett commenced suit against George F. Bartlett to quiet her title in the Hazel and Autocrat lodes as against George F. Bartlett's title to the Hardfoot and Razor Back lodes.

(14) That by prearrangement and collusion with Harriet Bartlett and her attorney, C. M. Sawyer, George F. Bartlett appeared in court in person on February 23, 1892, entered his appearance, declined to answer, waived trial by jury, and consented that the trial might proceed; that said suit was fraudulent in its inception, and intended by the parties to be used for the purpose of defrauding plaintiff, Largey, out of his interest in the Hardfoot and Razor Back claims.

(15) That afterwards, on February 23d, the court entered a judgment in favor of Harriet Bartlett and against George F. Bartlett, awarding her possession of the mining claims described as the "Hazel" and "Autocrat" lodes.

From the findings, as conclusions of law, the court found:

(1) That on September 10, 1891, plaintiff was an equitable owner of an undivided one-half interest in the mining claims, and was entitled to conveyance of the legal title on February 4, 1892.

(2) That the deed of George F. Bartlett to Harriet Bartlett was void as against plaintiff Largey.

(3) That the judgment in the case of *Harriet A. Bartlett v. George F. Bartlett* was void as against the right and title of the plaintiff to an undivided one-half interest in the Hardfoot and Razor Back claims.

(4) That plaintiff is entitled to a decree adjudging the deed to be void so far as the same might affect the title of the plaintiff to a one-half interest in the said claims; that the judgment for Harriet Bartlett against George F. Bartlett be vacated and set aside so far as it affected plaintiff's rights; and that she, and others acting with her, be enjoined from using the said judgment as against the said plaintiff or his said title to an undivided one-half interest to the said claims; and that George F. Bartlett be required to execute to the plaintiff a deed for the said one-half interest in the said claims; and that upon delivery of such deed plaintiff credit, and cause the Butte Hardware Company to credit, on the judgment of the Butte Hardware Company against J. H. Bartlett, the sum of \$350; and that the title of plaintiff, Largey, to an undivided one-half interest in the said claims be quieted as against all claims of the defendants, and each of them.

A decree was entered in conformity with the findings of the court. The defendants moved to set aside the findings and conclusions, and also moved for a new trial upon the grounds of insufficiency of evidence to support the decisions and findings of the court, and errors of law. The court overruled this motion and defendants appeal.

Chas. O'Donnell, Bickford, Stiff & Hershey and C. M. Sawyer, for Appellants.

There were no location notices posted on the Hardfoot and Razor Back claims by George F. Bartlett nor by any one for him at the time when an effort was made to file an amended location notice for each of said claims. They were not properly located. The law had not been complied with. The title of George F. Bartlett had never attached to the land, and he was never in a position when he could have given Largey a

deed even to a possessory right to the ground. Respondent is charged with notices of the defect in George F. Bartlett's title at the time when the alleged agreement was made and cannot now be heard to complain because he did not receive from Bartlett that which he knew Bartlett could not convey to him. The respondent is not entitled to the specific performance of the contract between himself and George F. Bartlett, because it is impossible to perform it, and because it was beyond the power of the obligor to perform that part which called for a conveyance of one-half interest in the mining claims, known as the Razor Back and Hardfoot. Again, George F. Bartlett had no right or authority to agree with respondent that the judgment against J. H. Bartlett should be credited with any sum of money, or to make any arrangement whereby the rights or responsibilities of J. H. Bartlett should be changed. This act of crediting the judgment with the sum of three hundred and fifty dollars (\$350) seems to be the consideration upon which the arrangement rests, and George F. Bartlett having no right to do the act agreed to be done by him, the contract is against law. The agreement between George F. Bartlett and P. A. Largey had never been filed or recorded, and Harriet A. Bartlett is not bound by the agreement. (§ 379 Code Civil Procedure.) It is not shown that George F. Bartlett was on the ground in controversy on the 11th day of September, 1891, and it is not shown that he had authorized any person whomsoever to locate any ground for him. One cannot become the agent of another except by his authority express or implied. (*McGoldrick v. Willits*, 52 New York, 612; *Bercich v. Marye*, 9 Nev. 312.) The relation of principal and agent cannot be established by evidence of dealings between agent and a third person. If the alleged principal has neither authorized nor ratified his acts but which acts are expressly repudiated the testimony of such transactions is irrelevant. (*North v. Meltz*, 57 Mich. 612.) Plaintiff was endeavoring to attack the validity of the judgment in the case of *Bartlett v. Bartlett*, on the ground of fraud, and at the same time enforce the specific

performance of a contract for the conveying to him of a one-half interest in the mining ground claimed by him. It was a collateral attack upon the judgment, and judgments cannot be so attacked. (*Vantilburgh v. Black*, 2 Mont. 371; *Wells F. & Co. v. Clarkson*, 5 Mont. 336; *Edgerton v. Edgerton*, 12 Mont. 122; *Morrow v. Moran*, 5 Wash. 692.)

F. T. McBride, for Respondent.

George F. Bartlett having entered into a contract with plaintiff that he would convey to plaintiff one-half of the Razor Back and one-half of the Hardfoot lode claims upon plaintiff expending certain money in improving and surveying the same and plaintiff having performed his part of the contract is estopped from denying that any such claims ever existed and the other parties defendant are in no better position. (Bigelow on Estopp., pp. 573 and 578; *Gebhart v. Reeves*, 75 Ill. 301; *Welch v. Bellville Savings Bank*, 94 Ill. 191.) Harriet Bartlett cannot claim to be a *bona fide* purchaser for the reason that her agent, J. H. Bartlett, by whom all her business in reference to the property in controversy in this suit has been conducted at all times had notice of Largey's claim and interest in the property. Notice to the agent is notice to the principal. (1 Am. & Eng. Ency. 419; *Bryant v. Bary*, 55 Geo. 438; 22 Am. & Eng. Ency. 935.) If an agent has notice at the time of his purchase for his principal of the equitable right of another, and of the claim of the latter to have previously purchased the subject of the sale, this will be notice to the principal. (*Whitney v. Burr*, 115 Ill. 289; *Bryant v. Bary*, 55 Geo. 438.) He who takes with notice of an equity, takes subject to the equity. Notice is not necessarily positive information brought directly home, but any fact that would put an ordinarily prudent man on inquiry, and a party will be as absolutely bound by notice given to his agent as if it was given to himself personally. (*Meir v. Blume*, 80 Mo. 179; *Williamson v. Brown*, 15 N. Y. 354; *Scott v. Umbarger*, 41 Cal. 410; *Pomeroy Eq. Jur.*, Secs. 595-597.) A grantee taking property under a quit-claim deed

is presumed to have notice of equity and is not a *bona fide* purchaser. (Pomeroy Eq. Jur., Sec. 753, p. 212, note 1, cases cited; *May v. LeClare*, 11 Wall. 217-232; *Dickerson v. Colgrove*, 100 U. S. 584.) Plaintiff's attack upon the judgment of *Bartlett v. Bartlett*, is not a collateral attack in any sense of the word. It is a direct proceeding to set the judgment aside. The judgment was procured through collusion and fraud on the part of G. F. Bartlett and the representatives and agents of Harriet Bartlett, and for such fraud should be set aside by a court of equity for the purpose of granting relief to the injured party in the case at bar. (Freeman on Judgments, §§ 486, 489 and notes; 1 Black on Judgments, § 321.) Collusion being one of the forms in which fraudulent designs are frequently pursued, vitiates all judgments into which it enters, and the person against whom it is employed may find relief in equity. (Freeman on Jud., Sec. 489, page 528; *Hardy v. Broadbush*, 35 Tex. 668; *Mayberry v. McClurg*, 51 Mo. 256.) Equity will not permit J. H. Bartlett, to make use of knowledge obtained through his position to defeat the titles he was employed to protect. The highest degree of faithfulness in action and responsibility for misconduct is exacted of one who occupies a fiduciary relation towards another. (*Rockford R. R. Co. v. Boody*, 56 N. Y. 461; *Butts v. Woods*, 37 N. Y. 317; *Coleman v. Second Av. R. R. Co.*, 38 N. Y. 201; *Mosely v. Lane*, 62 Am. Dec. 752.) No man can hold a benefit acquired by fraud or a breach of his duty. All the knowledge of the agent belongs to the principal for whom he acts, and if the agent use it for his own benefit he will become a trustee for his principal. (Perry on Trusts, Vol. 1, Sec. 206, 3rd Ed.; *Ringo v. Binns*, 10 Pet. 269; *Follansby v. Killbreth*, 65 Am. Dec. 691; *Chorpenning's Appeal*, 72 Am. Dec. 789; 2 Pom. Eq. 627.) A party will not be permitted to purchase property to hold for his own benefit when he has a duty to perform in relation thereto which is inconsistent with his character as a purchaser on his own account. (*King v. Remington*, 29 N. W. 358.) If an agent locates land for himself which he ought to locate for his prin-

cipal, he is in equity a trustee for his principal. (*Felix v. Patrick*, 145 U. S. 327-328; *Massie v. Watts*, 6 Cranch 148-168; *Widdicombe v. Childers*, 124 U. S. 400; *Brush v. Ware*, 15 Pet. 93; *Stark v. Storrs*, 6 Wall. 402-419; *Meador v. Norton*, 11 Wall. 442-458.)

HUNT, J.—The appellants contend that the evidence was insufficient to justify the findings and decision of the court. We will not state the testimony at length. An attentive examination of the record satisfies us that the decided weight of evidence was upon respondent's side, and that every material fact found by the court was amply sustained.

It is argued that the notices of location of the Razor Back and Hardfoot lode claims were invalid, and that George F. Bartlett was not the owner of said claims. But George F. Bartlett and the other defendants are in no position to say that said mining claims "never existed." George F. Bartlett had entered into a valid agreement with plaintiff, Largey, that he would convey to Largey a half interest in and to the Razor Back and Hardfoot claims upon the performance of certain conditions by Largey, by which, among other things, Largey was to expend money in improving and surveying said mining claims. Largey faithfully performed his part of the contract by expending large sums upon the claims, and Bartlett, having received the full benefit of the agreement, ought not to be heard in this suit to deny the existence of the claims or the validity of his own title to them. (*Collins v. Tillou*, 26 Conn. 368.)

To cure possible defects in the original notices of location, amended notices of location of said mining claims were made out and delivered by the surveyor to defendant J. H. Bartlett, George F. Bartlett's brother, to post at the discovery shafts of the Razor Back and Hardfoot lode claims; and, as the findings show, said Bartlett proceeded to post said notices on said claims September 11, 1891. J. H. Bartlett was at that time the trusted agent and employe of George F. Bartlett and this plaintiff, Largey, to assist the surveyor in

matters precedent to securing patents. J. H. Bartlett cannot, therefore, by availing himself of knowledge obtained while in such capacity defeat this plaintiff's rights, and profit by his violation of the confidence reposed in him. As against plaintiff Largey, the attempt of J. H. Bartlett to relocate the claims under different names and in his wife's name, after agreeing to post, and posting, amended notices in his brother's name, and for plaintiff's and his brother's benefit, was null and void. Having been sent to the claims as a representative and trusted agent of the plaintiff, having pointed out to the surveyor where the claims were, and having full knowledge of the contract relation existing between Largey and George F. Bartlett, his conduct in so changing the name of the locator after the surveyor had left was a gross violation of that common honesty which is due by every trusted agent to his employer and principal. Equity will therefore afford him no relief.

Nor can Harriet Bartlett, claiming that her husband was her agent, profit by the wrongdoing of her husband in attempting to locate the Hazel and Autocrat claims. At the time of the obliteration by him of the name of his brother, George F. Bartlett, as locator under the amended notices of location of the Hardfoot and Razor Back claims, J. H. Bartlett had notice of Largey's claim and interest in the property, and was their agent. The use of his wife's name was simply a fraud against his principals. It cannot avail him or her as against this plaintiff. (*Hancock v. Gomez*, 58 Barb. 490; *Mechem on Agents*, § 454 *et seq.*)

The subsequent suit of Harriet Bartlett against George F. Bartlett to quiet her title to the Hazel and Autocrat lode claims as against George F. Bartlett's title to the Hardfoot and Razor Back lodes was also collusive, and clearly instituted for the purpose of defrauding this plaintiff out of his interest in the latter lodes.

The court found that George F. Bartlett was a party to this fraud. He had just previously made oath to the amended locations of the Hardfoot and Razor Back claims, thus reaffirm-

ing his title to said claims. His appearance in court in the suit to quiet title, his refusal to file an answer, his consent to enter his appearance in said case, his waiver of trial by jury, and consent that the cause might proceed, are evidences of collusion and prearrangement between himself and Harriet Bartlett to divest plaintiff of his interest in the mining claims. The deed, too, from George F. Bartlett, executed about December 10, 1891, purporting to convey to his sister-in-law, Harriet Bartlett, all his interest in the Hardfoot and Razor Back lodes, having been made for the fraudulent purpose of defeating plaintiff's rights, and having been taken with notice of plaintiff's rights, as found by the court, was and is void as against this plaintiff's interest.

The whole case sustains the findings and conclusions of the trial court that the deeds and judgment referred to were given and obtained "for the purpose of defrauding P. A. Largey out of his interest in the said Hardfoot and Razor Back lodes."

Plaintiff directly assails the judgment in favor of Harriet Bartlett. This he may do upon the grounds alleged. (Freeman on Judgments, § 486 *et seq.*)

The questions of misjoinder of parties, and that several actions have been improperly united, are not properly presented by the record. The demurrer was not specific. Besides, an answer was filed after the overruling of the demurrer. (*Fultz v. Walters*, 2 Mont. 165; *Haverstick v. Trudel*, 51 Cal. 431; Boone on Code Pl., § 52; *Garver v. Lynde*, 7 Mont. 110; *Barber v. Briscoe*, 8 Mont. 214.)

We find no errors in the rulings of the court upon the admission or rejection of testimony which prejudiced appellants' substantial rights.

Largey having performed all the conditions of his agreement, and having expressed his willingness to cause the Butte Hardware Company to credit on the judgment of the Butte Hardware Company against J. H. Bartlett the sum of \$350, plaintiff was entitled to the relief asked in his complaint.

The court had jurisdiction to enter the decree declaring the

judgment of Harriet Bartlett against George F. Bartlett void as against plaintiff, and declaring void the deeds made by George F. Bartlett to Harriet A. Bartlett as against plaintiff's rights and interests in and to the Razor Back and Hardfoot lodes, and decreeing that George F. Bartlett make a deed to Largey for an undivided one-half interest in and to the said mining claims, and quieting plaintiff's title to his interest in said claims as against these defendants.

Several other errors are assigned, but none of them are well taken. The judgment is affirmed.

Affirmed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

STATE EX REL. SIMPSON, RELATRIX v. VOTAW, JUSTICE
OF THE PEACE, RESPONDENT.

[Submitted May 15, 1896. Decided May 18, 1896.]

CERTIORARI—*Justice of the peace*—*Inserting name in execution*.—The issuance of an execution by a justice of the peace is a judicial act and where he has inserted in the writ the name of one who is a stranger to the judgment, *certiorari* will lie to review his action. In such case an action in trespass for damages is not a speedy or adequate remedy, nor would the relator be required to move in the justice court that the execution be set aside.

Appeal from First Judicial District, Lewis and Clarke County.

APPLICATION for writ of *certiorari* to review action of justice of the peace in issuing an execution against the property of relatrix. The writ was granted by BUCK, J. Affirmed.

Statement of the case by the justice delivering the opinion.

Proceeding for writ of *certiorari*. The affidavit for the writ in this case shows that on the 17th day of March, 1894, Suesser & Aichele, co-partners, commenced a suit in respond-

ent's court against J. B. Simpson, the husband of relatrix, for \$25.25 on an account; that summons was issued against J. B. Simpson in said suit. The constable served the summons on J. B. Simpson by delivering a copy and reading the same to the relatrix, as the wife of the defendant, J. B. Simpson. On the 3d day of April, 1894, judgment was rendered by said justice against J. B. Simpson and in favor of the said Suesser & Aichele for the amount of the account and costs. On the 27th day of April, 1894, the justice issued execution on said judgment against said J. B. Simpson. On the 26th day of October, 1894, the justice issued an alias execution in the case against J. B. Simpson and this relatrix; the name of the relatrix having been inserted in said alias execution by the justice without her knowledge or consent. Under the alias execution the constable seized property belonging to the relatrix in her own name.

The answer or return of the justice contains no substantial denial of the facts alleged in the affidavit of the relatrix. Upon a hearing in the district court the court found that the relatrix was never served with summons in the case; that she was not a party to the suit, and had never appeared as a party to the suit of Suesser & Aichele against J. B. Simpson in said justice's court. The court further found that the justice, by entering the name of relatrix as a party to the suit, and placing her name in the alias execution on the 26th day of October, 1894, which the justice admits having done, exceeded his jurisdiction, and entered judgment that relatrix was entitled to the writ of *certiorari* prayed for. From this judgment the justice, A. C. Votaw, appeals.

E. A. Carleton, for Appellant.

F. N. McIntire, for Respondent.

PEMBERTON, C. J.—Appellant here contends that relatrix had a plain, speedy and adequate remedy at law; that she had a right of action against the justice; and that she should at least have gone before the justice, and moved to vacate the ex-

ecution, before bringing this suit. For these reasons counsel for appellant contends that the district court erred in issuing the writ of *certiorari*.

It may be true that relatrix could have permitted the constable to sell her property under the alias execution, and then sued him, the justice, and all other persons concerned in the taking and selling of her property thereunder in trespass for damages. But this remedy, we think, would not have been speedy or adequate. We think the relatrix, being a stranger to the judgment and execution under consideration, was not required to go into court to ask that the unauthorized alias execution be set aside. She had the right to treat the issuing thereof and the seizure of her property thereunder as unauthorized, and take such proceedings as were necessary to determine whether the justice had jurisdiction to issue the same.

Appellant's counsel say the issuing of the alias execution was a ministerial act, and therefore cannot be investigated in this proceeding. When the justice decided—evidently on the motion of some one—that he had the power or jurisdiction to issue the alias execution with the name of relatrix inserted therein as an execution defendant, he acted judicially. His acting as his own clerk, and issuing the execution, does not relieve the act of its judicial character.

We are clearly of the opinion that the justice had no jurisdiction to make relatrix a party to the suit and execution under discussion. We think the writ of *certiorari* was properly issued by the district court. The judgment appealed from is affirmed.

Affirmed.

HUNT, J., concurs. DE WITT, J., not sitting.

HOLTER LUMBER COMPANY, APPELLANT, v. FIRE-
MAN'S FUND INSURANCE COMPANY,
RESPONDENT.

[Submitted May 11, 1896. Decided May 26, 1896.]

APPEAL—Nonsuit—Order of dismissal.—The dismissal of an action is in effect a final judgment, and where a motion for a nonsuit is granted and an order made dismissing the action and giving judgment for costs, an appeal will lie from such order, as a judgment.

NONSUIT—Evidence.—On a motion for a nonsuit the law regards the issues proved which the evidence tends to prove. (*Soyer v. Great Falls Water Company*, 15 Mont. 1. cited.)

FIRE INSURANCE—Contracts—Construction.—Contracts of insurance, having for their object indemnity, should be liberally construed in favor of the insured, and the words of the agreement should be applied to the subject matter about which the parties are contracting at the time, the presumption being that such matter is in the minds of the parties at the time of their agreement.

SAME—Action on policy—Identity of building burned—nonsuit.—On an issue as to whether the building burned was the property covered by a policy which described the insured premises as a one story frame building and additions while occupied as a dwelling and greenhouse, evidence that plaintiff, when solicited by defendant's agent for insurance, stated that he intended to remove his dwelling house to the lots afterwards described in the policy and connect it with a greenhouse, then being constructed, and would then insure; that the policy was issued after the dwelling was removed to the lots, though it was never connected with the greenhouse, and that the building destroyed was a one story frame house and the same one which had been removed to the lots, but to which additions had been made, establishes *prima facie* the loss of the building described in the policy and the granting of a nonsuit was error.

SAME—Identity of property insured—Evidence of understanding of parties.—Proof of the destruction of a one story frame building, occupied only as a dwelling, and not connected with a greenhouse, situated upon the insured premises, does not *prima facie* relieve the insurance company from liability upon a policy in which the description called for a one story frame building, occupied as a dwelling and greenhouse, where the evidence tended to show that the company and the insured understood, when the policy was issued, that each structure was to be used for its proper purposes.

SAME—Evidence of waiver of proofs of loss.—Proof that the defendant's agent expressly waived formal proofs of loss after the fire, saying that the defendant was ready to pay its loss, tends on motion for a nonsuit to identify the house destroyed as the house insured.

SAME—Evidence of value of property.—In an action on an insurance policy, the original cost of the property destroyed, the cost of a like building at the time of the trial and the difference in value between the house burned and a new one by reason of age and use are proper subjects of inquiry in determining the value at the time of the loss.

Appeal from the Eighth Judicial District, Cascade County.

ACTION on a fire insurance policy. Defendant's motion for a nonsuit was granted by BENTON, J. Reversed.

This is an action on a contract of fire insurance. It is al-

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leged that about April 1, 1892, the defendant, by Phillip Gibson, its agent, solicited of J. H. Russell, the owner of the premises, insurance upon a one-story frame building and additions thereto, to be situated on lots 5, 6, and 7, block 24, of the Boston & Great Falls Addition to Great Falls; that Russell notified defendant that he would have said building insured as soon as it was removed to said lots, and, as soon as he was ready for the insurance, he would notify the defendant to issue the policy; that on or about June 9th thereafter, Russell notified the defendant that he was ready to have the policy issued, and the policy was issued; that at the time of the solicitation by Gibson, as agent, Russell paid in advance the premium for the said policy; and that it was well known to defendant that Russell did not want the policy issued and delivered until the house was removed to the lots hereinbefore referred to; and that the policy was not delivered until after the house was removed.

On February 9, 1893, it was averred, the property was totally destroyed, and that, on February 10th, Russell and plaintiff, the assignee of Russell's interest, notified defendant of the fire, and thereupon defendant waived the conditions of the policy requiring that notice of loss should be in writing, and released Russell from the performance of all conditions relating to proofs of the loss, and promised to pay plaintiff the sum of \$600, the amount of the insurance, and stated that no further notice or proofs of the loss were necessary; that thereafter defendant refused to pay the insurance, upon the ground that the property covered by the policy was not destroyed by fire.

The answer alleges a delivery of the policy to Russell on April 7, 1892, and set up that, at the time of the execution and delivery of the contract of insurance, Russell was engaged in the erection and construction of a building for use as a dwelling and greenhouse, upon the premises described in the policy, and that Russell applied for the policy upon the building aforesaid, then in process of construction.

The defendant denied that the building described in the pol-

icy was destroyed by fire. The answer admitted that there was a fire on the 9th of February, 1893, whereby a dwelling house, at that time standing upon one of the lots in the policy of insurance described, was destroyed by fire, and denied that at any time prior to the delivery of the policy the company was ever notified that the building which was afterwards destroyed by fire would be removed to, or erected upon, any of the lots mentioned in the policy; denied that Russell ever said that he desired insurance upon the building which was destroyed by fire, or that he ever requested the defendant not to deliver a policy until after the building which was subsequently destroyed by fire was removed to the lots mentioned in the policy. It is also alleged that the building which was burned was erected long subsequent to the issue and delivery of the contract of insurance, and was not attached to, or in any manner made a part of, the building insured, and which was upon the said premises and in process of construction at the time of the making of the contract of insurance; that the building destroyed was never used as a greenhouse; that the plaintiff failed to make proofs of loss as required by the terms of the policy; that any information to plaintiff that plaintiff need furnish no written proofs was given while under the belief that the building described in the policy had been destroyed. The answer denies all waiver, and pleads concurrent insurance without authority. The replication denied the new matter set forth in the answer. Evidence was introduced before the jury. At the conclusion of plaintiff's testimony, the defendant moved the court to dismiss the action upon the ground that the evidence showed that the property insured had not been destroyed by fire, that the building destroyed was not covered by the policy of insurance, and because it appeared that the building destroyed was never occupied as a greenhouse. The court granted this motion. Plaintiff excepted, and appeals from the order of nonsuit and judgment for costs.

The transcript contains no judgment, but, by leave of this court, plaintiff has filed a copy of the original "judgment and

order in the case," in which the following entry appears after the formal recitals: "Defendants then moved the court for a nonsuit, which motion was sustained by the court, to which plaintiff excepts. It is therefore ordered and adjudged by the court that this action be dismissed, and the case withdrawn from the jury. It is further ordered, adjudged, and decreed by the court that the defendant recover of and from the plaintiff its costs and disbursements herein expended, amounting to \$18.80. And it is further ordered by the court that plaintiff be granted a stay of proceedings for thirty days to prepare statement on appeal."

James Donovan, for Appellant.

To invalidate the policy on the ground that the building destroyed was not used as a greenhouse, it must appear that by not using it as a greenhouse the risk was changed, the hazard increased and hence the contract violated. (*Rafferty v. New Brunswick Ins. Co.*, 38 Am. Dec. 530; *Planters' Ins. Co. v. Sorrels*, 25 Am. Rep. 780; *Martin v. State Ins. Co.*, 43 Am. Rep. 397; *May on Insurance*, 3rd Ed. § 231.) Defendant's agent prepared the description found in the policy, hence if there is any uncertainty as to the identity of the property destroyed defendant is estopped from asserting any advantage against plaintiff. (*May on Insurance*, § 142; *Meadowcraft v. Standard Fire Ins. Co.*, 61 Pa. St. 91; *Sanders v. Cooper*, 115 N. Y. 279; 12 Am. St. Rep. 801; *Plumb v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 392; 72 Am. Dec. 526.) Policy must be construed most strongly against the insurer. (*May on Insurance*, § 420; *Darrow v. Family Fund Society*, 15 Am. St. Rep. 430; *Renshaw v. Mo. Etc. Ins. Co.*, 23 Am. St. Rep. 904.) If it be doubtful what buildings are covered by the policy, the doubt will be resolved against the insurers and evidence admitted to resolve the doubt. (*Franklin Fire Insurance Co. v. Updegraff*, 43 Pa. St. 350; *Beatty v. Lycoming Ins. Co.*, 52 Pa. St. 456; *May on Insurance* § 420 a.) In the construction of policies of insurance the intent and meaning of the parties are to be

regarded more than the strict literal sense of the words. (*O' Connor v. Towns*, 1 Tex. 107; 48 Am. Dec. 465; 86 Am. Dec. 362; *West v. Citizens' Ins. Co.*, 22 Am. Rep. 294.) Acts and declarations of agent of insurance company at time of taking risks and renewing same are admissible in an action on insurance policy notwithstanding the rule concerning parol evidence affecting written contracts, for this rule must yield to the rule that the company cannot take advantage of the mistakes and omissions of the agents within the scope of their employment. (*Tesson v. Atlantic Mut. Ins. Co.*, 93 Am. Dec. 293; *Beal v. Park Fire Ins. Co.*, 16 Wis. 257, 82 Am. Dec. 719; *North American Ins. Co. v. Throop*, 7 Am. Rep. 638; *Continental Ins. Co. v. Kasey*, 18 Am. Rep. 681; *Com. Ins. Co. v. Ives*, 56 Ill. 402; *May on Insurance*, § 294 E.) As to measure of damages. (See *May on Insurance*, § 423 B *et seq.*; *State's Ins. Co. v. Taylor*, 14 Col. 499.) Promising payment after knowing of a cause of forfeiture is a waiver. (*Cotton States Ins. Co. v. Edwards*, 74 Ga. 220.)

A. J. Shores, for Respondent.

HUNT, J.—The appeal in this case is “from the order of nonsuit and judgment for costs.” Respondent contends that an order for nonsuit is not appealable. But it is laid down in *Leese v. Sherwood*, 21 Cal. 152, that a dismissal of an action is in effect a final judgment in favor of the defendant. “It is a final decision of the action as against all claim made by it, although it may not be a final determination of the rights of the parties as they may be presented in some other action.” See, also, *Zoller v. McDonald*, 23 Cal. 136, and *McLeran v. McNamara*, 55 Cal. 508. Hayne on New Trial and Appeal, page 559, in note 21, puts this *quære*: “Is not an order granting a nonsuit a final judgment? Such an order amounts to a dismissal of the action, and we have seen that a dismissal is a final judgment.”

Here the court granted a motion for nonsuit, dismissed the suit, and ordered and adjudged that respondent recover its costs. This was a judgment. (Hayne on New Trial and Ap-

peal, page 555, and note.) The only possible thing left to do was the entry of a more formal judgment by the clerk. Surely, the effect of the ruling of the court was that of a final decision against plaintiff, and we think he could appeal from such an order, as a judgment.

Contracts of insurance ought to be construed to carry out the intention of the parties, as expressed or indicated by their language used. (Beach on Insurance, § 546.) Such contracts having for their object indemnity, the rule is that they are to be construed liberally to carry out such objects. "No rule in the interpretation of a policy is more fully established, or more imperative and controlling, than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which in making the insurance was his object to insure." (May on Insurance, § 175.)

It is also an established principle in the construction of fire insurance policies, as well as other contracts, that the words of the agreement are to be applied to the subject matter about which the parties are contracting at the time, the presumption being that such matter is in the minds of the parties at the time of their agreement. (Wood on Fire Insurance, page 145.)

Bearing these principles in mind, was the action of the lower court in granting a nonsuit correct? The evidence tended to show that in April, 1892, Mr. Gibson, the defendant's agent, solicited insurance, from Russell, owner of the premises; that Russell told him that he intended to move the house he was then living in to the lots described in the policy, and would connect it with the greenhouse then being constructed on said lots described in the policy. This building to be moved was a one-story house, with four rooms, attached to a greenhouse. The policy and description therein were made out by the agent, and were upon J. H. Russell's "one-story frame, shingle-roof building, and additions, while occupied as a dwelling and greenhouse, situated on lots Nos. 5, 6 and 7, block 24, on the — side of — avenue, and between — street, and in

Boston and Great Falls Addition to — street, Great Falls, Montana. Other concurrent insurance permitted. Permission granted to complete.”

After the dwelling house was moved to the lots, Russell received his policy. The dwelling house was moved to one of the lots described in the policy, but was not connected with the greenhouse, which stood on the furthest of the three lots so described. The fire destroyed a one-story frame house, the same house that was removed from the place where it had stood when the agent solicited the insurance, but with additions thereto, which made it a nine instead of a four room house. The identity of the property described, whether the building burned was covered by the policy, was the main question. That was one of fact, and we think was erroneously decided. (*Southwest Lead & Zinc Co. v. Phoenix Ins. Co.*, 27 Mo. App. 446.) Parol evidence is admissible, not to vary or contradict the terms of the policy, but to explain it,—to get at its true meaning. (*Tesson v. Atlantic Mut. Ins. Co.*, 40 Mo. 33, 50 Mo. 112; *Beach on Insurance*, § 552.) “The general rule is that the construction of the policy of insurance is a question of law for the court to determine, and warranties as we shall see hereafter, must be strictly enforced, regardless of their materiality; but when the language employed to describe the thing warranted is not free from ambiguity, or when it is equivocal, and its interpretation depends upon the sense in which the words are used, in view of the subject to which they relate, the relation of the parties, and the surrounding circumstances properly applicable to it, the intent of the parties becomes a matter of inquiry, and the interpretation of the language used by them is a mixed question of law and fact. Such a question is to be submitted to the jury under appropriate instructions.” (*Richards on Insurance*, § 45.)

On a ruling upon a motion for a nonsuit, the law regards the issues proved which the evidence tends to prove. (*Soyer v. Water Co.*, 15 Mont. 1.)

In our opinion, the plaintiff made out a *prima facie* case of

the loss by fire of his one-story, frame, shingle-roof dwelling house, situated upon the lots, and described in the policy. It follows that the court ought not to have granted a nonsuit unless it appeared that defendant's additional ground of motion was well taken,—that the building destroyed by fire was never occupied as a greenhouse. But we do not think that, *prima facie*, the defendant is relieved from liability because the frame, shingle-roof building and additions were not occupied for the two purposes,—a dwelling house and a greenhouse. The evidence tends to prove that the agent and the insured understood that the frame house was for dwelling purposes, while the greenhouse was for its proper purposes, and that the policy was made out with that understanding. At least, there is nothing in the policy inconsistent with the evidence to that effect. Furthermore, upon the whole evidence in the record, the conduct of the company, by its agent Gibson, who was in Great Falls after the fire, tends to prove that the agent intended to insure the particular house destroyed. By expressly waiving formal proofs of loss after the fire, and saying that the defendant was ready to pay its loss, he seems to have identified the house destroyed as the house insured. Of course, if the hazard were increased by not connecting the house and greenhouse, and such increase were without defendant's consent, different questions would arise. But those matters are not now before us.

The plaintiff sought to introduce evidence of the value of the property destroyed, by asking for opinions of builders and others upon descriptions given. Much of this testimony was excluded. The rule laid down by the supreme court of Colorado appears to be just, and to be approved of by late authorities. It is this: "The measure of damages in an action for such a loss is the value at the time of the loss; and, to arrive at that, the original cost, the cost of a like building at the time of the trial, and the difference in value between the house burned and a new one by reason of age and use, are all proper subjects of inquiry." Judgment reversed, and cause remanded for new trial.

Reversed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

MOORE, RESPONDENT, v. NORTHERN PACIFIC RAIL-
ROAD COMPANY, APPELLANT.

[Submitted May 12, 1896. Decided May 25, 1896.]

NORTHERN PACIFIC GRANT—Decision of secretary of interior—Collateral attack.—The decision of the secretary of the interior that certain lands were not embraced within the grant to the Northern Pacific Railroad Company, cannot be collaterally attacked in an action by the patentee thereof to recover money paid to the defendant on a contract for the sale of the lands. (*Colburn v. Northern Pacific R. R. Co.*, 13 Mont. 476, followed.)

SAME—Remedy.—The defendant's remedy in such case, if any, is in equity by a suit to vacate the patent, brought either in its own name or through the government.

Appeal from Ninth Judicial District, Gallatin County.

ACTION to recover purchase price of land on failure of title. Judgment, on the pleadings, was rendered for the plaintiff below by ARMSTRONG, J. Affirmed.

Cullen & Toole and Fred M. Dudley, for Appellant.

Luce & Luce, for Respondent.

PEMBERTON, C. J.—Precisely the same facts are involved in this case as were involved in the case of *Colburn v. Northern Pacific Railroad Co.*, 13 Mont. 476. The same issues are presented as in that case. Upon the authority of that case the district court rendered judgment in this case on the pleadings in favor of the plaintiff, and from that judgment the defendant appeals.

In *Colburn v. Northern Pacific Railroad Co.*, *supra*, this court said: "The decision of the secretary of the interior that certain land was not included within a grant to the defendant corporation is conclusive until reversed in a direct proceeding for that purpose, and cannot be collaterally attacked in an action to recover the purchase price of the land by one to whom it had been conveyed by the defendant."

In this case the defendant seeks to attack the decision of the secretary of the interior in deciding that the lands mentioned

18	290
18	292
18	293
18	290
28	420
18	290
34	219

in the pleadings were not within the grant of the defendant, and that the defendant never had any title thereto in a contest between plaintiff and defendant. This is a collateral attack upon the decision of the secretary of the interior. Upon the authority of *Colburn v. Northern Pacific Railroad Co.*, *supra*, and the authorities cited therein, we are clearly of the opinion that this cannot be done.

Counsel for appellant contends that decisions of the secretary of the interior, made solely on the construction of the law, may be attacked in this proceeding; but it nowhere appears that the land contest between plaintiff and defendant was determined by the secretary of the interior upon a construction of law only. As far as the record shows the secretary passed upon the facts, and we cannot say his decision was arrived at from a construction of the law only. Decisions are generally rendered upon a consideration of both the law and facts. We think, for these reasons, that *Railroad Co. v. Forsythe*, 159 U. S. 46, 15 Sup. Ct. 1020, and *Railroad Co. v. McCormick*, 72 Fed. 736, cited by counsel for appellant, are not in point.

As held in *Colburn v. Northern Pacific Railroad Co.*, *supra*, we think defendant's remedy, if it has any, is by suit in equity to set aside the patent issued to plaintiff, either in its own name, or by procuring the government to bring suit by its officers to vacate it.

We see no error in the action of the district court in rendering judgment on the pleadings. The judgment appealed from is therefore affirmed.

Affirmed.

HUNT, J., concurs. DE WITT, J., not sitting.

BECK, RESPONDENT, v. NORTHERN PACIFIC RAIL-
ROAD COMPANY, APPELLANT.

[Submitted May 13, 1896. Decided May 26, 1896.]

See syllabus and opinion in *Moore v. Northern Pacific Railroad Company*, ante, page 290

Appeal from Ninth Judicial District, Gallatin County.

Cullen & Toole and Fred M. Dudley, for Appellant.

Hartman Bros. & Stewart, for Respondent.

PER CURIAM.—The record in this case presents exactly the same facts, issues and questions involved in *Colburn v. Northern Pacific R. R. Co.*, 13 Mont. 476, and *Moore v. Northern Pacific R. R. Co.*, just decided. Upon the authority of these cases the judgment appealed from in this case is affirmed.

Affirmed.

VOGEL, RESPONDENT, v. NORTHERN PACIFIC RAIL-
ROAD COMPANY, APPELLANT.

[Submitted May 13, 1896. Decided May 25, 1896.]

See syllabus and opinion in *Moore v. Northern Pacific Railroad Company*, ante, page 290.

Appeal from Ninth Judicial District, Gallatin County.

Cullen & Toole and Fred M. Dudley, for Appellant.

Hartman Bros. & Stewart, for Respondent.

PER CURIAM.—The record in this case presents exactly the same facts, issues and questions involved in *Colburn v. Northern Pacific R. R. Co.*, 13 Mont. 476, and *Moore v. Northern Pacific R. R. Co.* just decided. Upon the authority of these cases the judgment appealed from in this case is affirmed.

Affirmed.

SALES, RESPONDENT, v. NORTHERN PACIFIC RAIL-ROAD COMPANY, APPELLANT.

[Submitted May 18, 1896 Decided May 25, 1896.]

See syllabus and opinion in *Moore v. Northern Pacific Railroad Company*, ante, page 290.

Appeal from Ninth Judicial District, Gallatin County.

Cullen & Toole and Fred M. Dudley, for Appellant.

Hartman Bros. & Stewart, for Respondent.

PER CURIAM.—The record in this case presents exactly the same facts, issues and questions involved in *Colburn v. Northern Pacific R. R. Co.*, 13 Mont. 476, and *Moore v. Northern Pacific R. R. Co.* just decided. Upon the authority of these cases the judgment appealed from in this case is affirmed.

Affirmed.

GOODWELL, RESPONDENT, v. THE MONTANA CENTRAL RAILWAY COMPANY, APPELLANT.

[Submitted May 14, 1896. Decided May 25, 1896.]

MASTER AND SERVANT—Fellow servants—Negligence of foreman—Railroads.—The foreman or boss of a small extra gang of six men engaged in repairing the defendant's railroad is not clothed with the control and management of a distinct department, but of a mere separate piece of work in one of the branches of service in a department, and therefore, negligence of the foreman in not giving warning before ordering the men to bear down on a rail which broke and injured the plaintiff, a laborer in the gang, was not the neglect of a duty which the defendant company was bound to perform, but was the negligence of a fellow servant for which the company was not liable.

Appeal from Second Judicial District, Silver Bow County.

ACTION for damages for personal injuries. The cause was tried before McHATTON, J. Plaintiff had judgment below. Reversed.

Statement of the case by the justice delivering the opinion.

18b	293
18	405
18	407
19	130

18b	293
24	169

18	293
Case 2	
32	77
32	78

18	293
Case 2	
38	104
38	106

18	293
Case 2	
41	154
41	172

This was an action brought by plaintiff against the defendant to recover damages from the defendant company, alleged to have been sustained on account of defendant's negligence. Plaintiff was a laborer in the service of the defendant when he was injured. The defendant denied the injury, and denied any negligence, and alleged that at the times mentioned in plaintiff's complaint its tools and appliances were in good order; and that, if plaintiff was injured at all, it was owing to his own neglect and want of care. The case was first tried in a justice of the peace court, and judgment rendered for plaintiff against the defendant for \$298. It was appealed to the district court, where the following facts were brought out in evidence: The plaintiff was a laborer in an extra gang of about six men employed by the defendant company. McNulty was foreman of the gang, and hired plaintiff. On December 15, 1893, the men were raising the track called the "guard rail," and plaintiff was putting a block as a fulcrum in under the rail to lift the track with. The rail stuck in the block. When the foreman told the men to raise up the rail, they did so. Several of the men who were in the gang were at the further end of the rail, plaintiff being close down to the track, where the block was to be put in. The plaintiff got hold of the rail with both hands, and lifted it up under the rail in the track, and wanted to shove up the block with his foot to get a good lift. Finding the block would not move, he kicked it off, and then shoved it up tight, and put his hand down to straighten it. The block came up sideways, and while plaintiff was down in that position, and had the block partly straightened, and as he was about to raise up, the men came down on it, and the rail broke. The foreman had hold of the rail, and told the men to come down on it, and they did so. Plaintiff said he had no opportunity to get away after the foreman ordered the men to come down. He jerked his hand and foot as quickly as he could, but the rail fell on his foot, and hurt him, breaking the bones in his toe, and otherwise injuring his foot.

The court, among other things, charged the jury as follows: "You are instructed that if you find that the plaintiff was in-

jured through the carelessness of the foreman in giving orders when the plaintiff was in a dangerous position, and that the foreman did not act with ordinary care and prudence, then the plaintiff should recover against the defendant such damages as the evidence shows he has sustained."

The following instructions were refused: "The court instructs the jury that the rule of law is that a common employer is not responsible to a servant for an injury caused by the negligence or carelessness of a fellow servant of such servant engaged in the same line of employment; and in this case, if the jury believe from the evidence that at the time of the accident in question the plaintiff was in the employ of the defendant as a laborer engaged in repairing one of the defendant's tracks, and that while so employed, and in the line of his duty, he received an injury resulting from the negligence or carelessness of the foreman or boss superintending said work, then the court instructs the jury as a matter of law that the plaintiff and such foreman were fellow servants in the same grade or line of service within the meaning of the law, and the defendant would not be liable for such injury.

The court instructs the jury that if they believe from the evidence that plaintiff, together with other persons, were engaged in repairing or working upon the track of the defendant, and in the employ of the defendant, then they were fellow servants engaged in the same common employment. The fact that one of them had the control or command over the others, was the foreman or boss (if such was the fact), would not be sufficient to destroy such relation of fellow servants; and if the injury complained of herein, if any, was caused or brought about by the carelessness or negligence of such foreman or boss, still the defendant would not be liable therefor."

The jury found a verdict for plaintiff in the sum of \$200. The defendant moved for a new trial, assigning as error the giving of the instruction hereinbefore quoted, and the refusal to give the instructions above set forth. The motion for a new trial was overruled. Defendant appeals from the order overruling the motion for a new trial and from the judgment.

H. G. McIntire and A. J. Shores, for Appellant.

The jury were instructed that if at the time of the accident complained of the defendant's section foreman had employed plaintiff, and then and there had charge of him in and about the work being done, and the plaintiff was injured through the negligence of such foreman, and without negligence on his part, then he would be entitled to recover against the defendant. This instruction is obviously erroneous. The true test of whether co-employees are or are not fellow servants does not depend upon the grade or rank of service, nor upon whether the one had authority to control the actions of the other, but the controlling consideration is whether the act or omission is one arising from a duty owing by the master to the servant, the discharge of which duty is intrusted by the master to the negligent servant. (*Laning v. New York Central R. Co.*, 49 N. Y. 528; *Noyes v. Wood*, 36 Pac. 766; 2 Wood on Railroads, § 388; *Laughlin v. State*, 11 N. E. Rep. 371; *Hofnagle v. New York Central R. Co.*, 55 N. Y. 708; *Wright v. New York Central R. Co.*, 25 N. Y. 565; *New Pittsburg etc. Co. v. Peterson*, 35 N. E. Rep. 7; *Farwell v. Railroad Co.*, 4 Metc. (Mass.) 49; *Hogan v. Central Pacific Ry. Co.*, 49 Cal. 128. *McCosker v. Long Island R. Co.*, 84 N. Y. 77.) "Prima facie, all who enter into the employ of a single master are engaged in a common service, and are fellow servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow servants." (*B. & O. Railroad Co. v. Baugh*, 149 U. S. 368.) The nature of the act or thing done, in the performance of which negligence is alleged, is the true criterion of the relation sustained by those employed by a common master to each other. (*New Pittsburg etc. Co. v. Peterson*, *supra*, *St. Louis etc. R. Co. v. Torrey*, 24 S. W. Rep. 244; *Larich v. Moies*, 28 Atl. Rep. 661; *Hoke v. St. Louis etc. R. Co.*, 11 Mo. App. 574; *Quinn v. New Jersey Lighterage Co.*, 23 Fed. 363; *Crispin v. Babbitt*, 81 N. Y. 516; *Easton v. Houston & T. C. R. Co.*, 32 Fed. 896.) It has been settled by nearly every court of last resort in the

United States that a master or employer is not responsible to those engaged in his employment for injuries suffered by them as the result of negligence, carelessness or misconduct of other servants in his employ, denominated fellow servants or co-employees, unless the employer himself is at fault. (Beach on Contributory Negligence, § 102; McKinney on Fellow Servants, § 9.)

HUNT, J.—This case presents for decision the question whether the foreman or boss of the small extra gang of about six men engaged in repairing the defendant's railroad, and the plaintiff, a laborer in the gang, were fellow servants of the railroad company, so as to preclude the plaintiff from recovering damages from the company for personal injuries caused by the negligence of the boss.

Since the decision of this court on the rehearing of the case of *Crisswell v. Railroad Co.*, ante, page 167, announcing that the statute of the territory of Montana, which modified the common law rule of the liability of a master to his employes for injuries to the latter by the negligence of a superior, was repealed by the adoption of the state constitution, the courts are obliged to determine questions such as the one now before us by the general law.

The supreme court of the United States regard the question as essentially one of general law. "It does not depend," says Justice Brewer in *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, "upon any statute. It does not spring from any local usage or custom. There is in it no rule of property; but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the states to legislate and change the rules of the common law in this respect as in others; but, in the absence of such legislation, the question is one determinable only by the general principles of that law."

Reference must, therefore, always be had to the principles controlling the relations of the master towards his servant.

We should turn, too, to the decisions of learned courts which have applied those principles, and established precedents worthy to be regarded as authorities. But in the consideration of all such adjudged cases it is well to bear in mind that the varying applications of the rules of the law of negligence demand that each decision should be strictly regarded with relation to the exact facts before the court. The distinctions necessarily become highly important.

The familiar rule is that the servant entering the service assumes the ordinary risks of the employment entered into, which include the risk of injuries caused through a fellow servant's negligence. The recognition of this rule underlies the Ross case, 112 U. S. 377, 5 Sup. Ct. 184, and the many subsequent decisions of the federal supreme court. The difficulties have been in determining what is properly deemed a common employment. After consideration of the conduct of railroads and their "vast and diversified" business, it has been finally held that the principle that a master is liable to a servant who is injured through the master's failure of duty towards him is reasonably applied where of practical necessity, there are distinct and separate departments of service in the general conduct of the business, and where persons placed by the master in charge of any such departments or separate branches are given entire or absolute control therein, such persons, so far as employes under them are concerned, are vice-principals and representatives of the master. Such is the doctrine of the Ross case, *supra*, as interpreted and followed by the supreme court in late decisions.

But the application of the rule of the Ross case has been most cautiously restricted by the supreme court and their discussions of the meaning of the phrase, "different branches or departments of service," demonstrate the care with which the learned justices now guard the line of separation between a fellow workman and a superintendent of a particular and separate department. "It has ever been affirmed," they say in the Baugh case, "that the employe assumes the ordinary risks incident to the service; and, as we have seen, it is as

obvious that there is risk from the negligence of one in immediate control as from one simply a co-worker."

In *Railroad Co. v. Hambly*, 154 U. S. 349, 14 Sup. Ct. 983, the court, by Justice Brown, classify the decisions of the leading state courts upon the fellow-servant doctrine, and thus speak of the classes of cases involving the questions of "subordination" of fellow-servants and "different departments": "Of both classes of cases, however, the same observation may be made, viz: that to hold the principal liable whenever there are gradations of rank between the person receiving and the person causing the injury, or whenever they are employed in different departments of the same general service, would result in frittering away the whole doctrine of fellow service. Cases arising between persons engaged together in the same identical service—as, for instance, between brakemen of the same train, or two seamen of equal rank in the same ship—are comparatively rare. In a large majority of cases there is some distinction, either in respect to grade of service or in the nature of their employments. Courts, however, have been reluctant to recognize these distinctions unless the superiority of the person causing the injury was such as to put him rather in the category of principal than of agent—as, for example, the superintendent of a factory or railway,—and the employments were so far different that, although paid by the same master, the two servants were brought no further in contact with each other than as if they had been employed by different principals."

To these examples where the superior is deemed a principal rather than an agent, may be added the superintendent of a mine, as was decided in *Kelly v. Mining Co.*, 16 Mont. 484.

Adhering to the doctrine that mere superiority of position is no ground of liability, the supreme court has recently been called on to decide the precise question involved in this case. In *Railroad Co. v. Peterson*, 16 Sup. Ct. 843, one Holverson was foreman of an extra gang of men employed on a section of the road to keep the same in repair. The duties of the gang were to put new ties in where necessary, and to do work

of that general nature. The section gang worked under the foreman or boss. Holverson, as foreman, had the power to employ men and to discharge them. The company furnished the tools. Holverson always went with the men, and superintended their work. While the men were returning from work one day upon two hand-cars, Holverson, the foreman, negligently applied the brakes on the front car, and abruptly stopped it. He gave no warning of his intention, and the rear car ran into the one ahead, the result of which was that the first car was thrown from the track, and plaintiff was injured. He recovered damages. The court assume that Holverson had exclusive charge of the direction and management of the gang in all matters connected with their employment, and that the plaintiff was subject to the authority of Holverson in all matters relating to his duties as laborer. The circuit court of appeals held (51 Fed. 182) that the plaintiff and Holverson were not fellow servants, so as to preclude plaintiff recovering from the railroad company for injuries sustained through the negligence of Holverson, acting as such foreman. But the supreme court say that a foreman of such a gang is not a chief or superintendent of a separate and distinct department or branch of business of the company, as those terms are used where the company is made liable for the negligence of such officers. The Ross and Baugh cases are discussed, and the meaning of the expression "departmental control," as applied to facts like those in the case before us, is construed to be correctly laid down in *Railroad Co. v. Hambly*, *supra*, where it was said: "That a common day laborer in the employ of a railroad company, who, while working for the company under the orders and direction of a section boss or foreman on a culvert on the line of the company's road, receives an injury through the neglect of a conductor and an engineer in moving a particular passenger train upon the company's road, is a fellow servant of such engineer and of such conductor in such a sense as exempts the railroad company from liability for the injury so inflicted." The last case cited, and that of *Railroad Co. v. Keegan*, 160 U. S. 250, 16 Sup. Ct. 269, "exclude,"

says Mr. Justice Peckham, "by their facts and reasoning, the case of a section foreman from the position of a superintendent of a separate and distinct department."

As directly applicable to the facts of the case before us, we quote as follows: "This boss of a small gang of 10 or 15 men, engaged in making repairs upon the road, wherever they might be necessary, over a distance of three sections, aiding and assisting the regular gang of workmen upon each section as occasion demanded, was not such a superintendent of a separate department, nor was he in control of such a distinct branch of the work of the master, as would be necessary to render the master liable to a co-employee for his neglect. He was in fact, as well as in law, a fellow workman. He went with the gang to the place of work in the morning, stayed there with them during the day, superintended their work, giving directions in regard to it, and returned home with them in the evening, acting as a part of the crew of the hand-car upon which they rode. The mere fact, if it be a fact, that he did not actually handle a shovel or a pick, is an unimportant matter. Where more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss and the other subordinate, but both are, nevertheless, fellow workmen."

The court disapprove of the view of the circuit court of appeals "that the nature and character of the respective duties performed by and devolved upon persons in the same common employment should in each instance determine whether they are or are not fellow servants, and that such relation should not be deemed to exist between two employees where the function of one is to exercise supervision and control over some work undertaken by the master which requires supervision, and over subordinate servants engaged in that work, and where the other is not vested by the master with any such power of direction or management."

The facts of that particular case presented no difficulty by way of embarrassment, in determining the question of the line of separation between a fellow workman and a superintendent

of a particular and separate department, for, say the court, the foreman and the laborer in such a case are clearly fellow servants. That case is clearly decisive of this one. Here the neglect for which the plaintiff recovered was the neglect of McNulty, the foreman, in not exercising proper caution by warning the plaintiff and other men to look out before he ordered the men to bear down on the rail before it broke. Under the Baugh decision, the foreman, McNulty, was not "clothed with the control and management of a distinct department," but of a mere separate piece of work in one of the branches of service in a department. It was, therefore, "not a neglect of that character which would make the master responsible therefor, because it was not a neglect of a duty which the master owes, as a master, to a servant when he enters his employ." (*Peterson v. Railroad Co.*, *supra*.)

The Peterson case, just cited, was also approved of in *Railroad Co. v. Charles*, 16 Sup. Ct. 848, where the court refer to the general principles of the law of master and servant set forth in the Peterson case as controlling the case then under consideration.

It follows that the instructions of the court to the jury were erroneous. The court ought to have given the substance of those asked to be given by the defendant. For these errors the judgment must be reversed, and the case remanded, with directions to grant a new trial.

Reversed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

CITY OF BUTTE, APPELLANT, v. PEASLEY, RESPOND-
ENT.

[Submitted May 19, 1896. Decided May 25, 1896.]

PLEADING—Scandalous matter—Prosecution under city ordinance.—A complaint for vagrancy under a city ordinance should not be dismissed because the charging part of the complaint concludes with scandalous matter, but such matter should be stricken out where the complaint, independently of the objectionable matter, sufficiently sets forth the offense.

Appeal from Second Judicial District, Silver Bow County.

PROSECUTION for vagrancy under a city ordinance. Defendant's demurrer was sustained by SPEER, J. Reversed.

L. J. Hamilton and John W. Cotter, for Appellant.

HUNT, J. The defendant was adjudged guilty of vagrancy, in violation of section 1 of ordinance 55 of the city of Butte. The complaint originally made in the police court of the city of Butte was signed by Charles Swanson, a policeman. It charged the defendant with a violation of section 1 of ordinance 55 of said city, entitled "An ordinance relating to vagrants, opium smoking and obstructing sidewalks," and contained the following averment: "That upon information and belief, at and in said city, the said defendant, then being, did then and there violate said section of said ordinance, by willfully and unlawfully being an idle and dissolute male person who loiters in and about saloons, gambling houses, and houses of prostitution, and in being a first class pimp." The defendant appealed to the district court from the judgment in the police court. In the district court the defendant demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The court sustained the demurrer and dismissed the case for the reason that the complaint contained scandalous matter. The defendant was discharged. The city of Butte appealed.

We are constrained to reverse the ruling of the court. The complaint stated an offense, by charging the defendant with having unlawfully been an idle and dissolute male person, loitering about saloons, gambling houses, and houses of prostitution. The court seems to have taken this view of the main allegations of the complaint, as the dismissal was put upon the express ground that the complaint contained scandalous matter. Plainly, the matter considered scandalous were the words concluding the charging part of the complaint, viz: "and being a first-class pimp." These words constituted an allegation of matter unbecoming the dignity of the court to hear. It would therefore have been eminently proper for the court, of its own motion, to strike them out, and to severely rebuke the complainant or attorney who had used them, and the magistrate of the city who had permitted them to be used. But the action should not have been dismissed because a portion of the complaint was irrelevant or scandalous. Section 101 of the Code of Civil Procedure of 1887 provides that irrelevant matter inserted in a pleading may be stricken out upon such terms as the court may, in its discretion, impose. This section—indeed, the inherent power of a court—is sufficient to enable it to strike out of any pleading scandalous language not material to the matter in dispute. The following authorities are in point: Baylies, Code Pl. p. 365; *Mc Vey v. Cantrell*, 8 Hun. 522; 1 Daniell, Ch. Pl. & Prac. *p. 351.

The word "pimp" in the complaint, is by itself not necessarily so objectionable. Webster defines "pimp" as one who provides gratification for the lust of others; a procurer; a pander. It is likewise defined in substantially the same language in the Century dictionary. It is particularly offensive, however, in this complaint, by the language connected with its use. Scurrility and slang have no proper place in a pleading. Naturally, the word, by its significance, is used as a term of opprobrium, bearing cruelly upon the moral character of a person so charged. But the court ought to have stricken out the objectionable language, instead of dismissing the action; for,

independently of the objectionable words, the defendant was sufficiently charged with vagrancy.

The order sustaining the demurrer and dismissing the action is reversed.

Reversed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

PHILLIPS, APPELLANT, v. PHILLIPS, EXECUTRIX, RESPONDENT.

[Submitted May 18, 1896. Decided June 1, 1896.]

EXECUTORS—Parties—Identity of plaintiff and defendant—Claims against estate.—An executrix of an estate cannot maintain an action in her personal capacity against herself in her representative capacity, upon a claim against the estate, incurred for funeral expenses, which she had approved, as executrix, but which had been disallowed by the court and which, after being so disallowed, had been assigned to her by the owners; nor upon a claim for an allowance as the widow of the decedent.

SAME—Same—Section 167 Probate Practice Act construed.—Section 167 of the Probate Practice Act (1887) providing that if an executor is a creditor of the decedent and his claim has been presented to the probate judge and rejected he may maintain an action thereon against the estate, contemplates an existing debt, and does not authorize an action on a claim paid by an executrix, personally, after the decedent's death and in the course of administration; nor does it authorize an action for an allowance by the widow of the decedent while acting as executrix.

Appeal from Second Judicial District, Silver Bow County.

ACTION on claims against an estate. Defendant's demurrer to the complaint was sustained by McHATTON, J. Affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiff, Anna M. Phillips, commenced this action against herself as executrix of the will of her husband, George W. Phillips, deceased, to recover the sum of \$2,521.25, and for an allowance of \$100 per month out of the estate of her husband for necessary maintenance from the time of her appointment as executrix up to the time of her final release and discharge. Her complaint alleges, under her first cause of

action, that her husband in his last illness asked that his body be buried in the Oakland cemetery, St. Paul, Minn., and that in conformity with said request she transported the body from Butte to St. Paul, bought a burial lot, erected a monument, and in and about other funeral and burial expenses was compelled to pay out \$2,521.25. She pleads that considering the amount and value of the estate, which was appraised at over \$20,000, and considering that what plaintiff did was done at the request of the decedent, made before his death, the amount paid out was reasonable, and should have been allowed to her as a credit in the settlement or account as executrix of her husband's will; that accounts, duly verified as required by law, were presented by the persons to whom the money was due and paid, and were allowed and approved by her as executrix, and were afterwards presented to the judge of the district court for approval and allowance, but the judge rejected the claims; that it was impossible for plaintiff to recover back the money so paid on said accounts, and that, after the judge disallowed the same, the persons to whom the moneys were paid sold, assigned and transferred their several claims to plaintiff, and plaintiff became the legal owner and holder thereof; that after such assignment she presented to the judge of the district court an account for the moneys so paid out and expended, but the court rejected the claims.

For a second cause of action, after alleging the death of her husband, and her appointment as executrix under the will, and the value of the estate, plaintiff avers that when her husband died he was not possessed of any homestead or real estate out of which a homestead could be set apart for her use during her administration of his estate; that she applied to the court for an allowance for maintenance and support during the time she might be engaged in the discharge of her duties as executrix, but said allowance was refused; that without an allowance her only compensation will be the commissions due her as executrix, to wit, \$524.15, and that the necessary expenses of plaintiff while engaged in the settlement of the estate, and removal and burial of her husband's body, exceed the sum of

\$100 per month, and that said sum is just and reasonable, and should have been allowed and granted by the court, and that the estate is solvent.

The claim which plaintiff presented to the judge, and which was rejected before the commencement of this suit, is an itemized statement of the claims "paid by said executrix on account of said estate, which claims were afterwards rejected and disallowed by the court on the 7th day of April, 1894, to wit: "

Oakland Cemetery, St. Paul, Minn.....	\$1 599 00
Minnesota Steam Marble Works.....	367 25
William Dampier.....	55 00
Total.....	<hr/> \$2,521 25

By John T. Baldwin, Esq., who it is conceded was appointed counsel for the defense, a demurrer was interposed to the first cause of action upon several grounds, one of which was that the plaintiff could not acquire title to the said claims by purchase, assignment or otherwise; and upon the further ground that there is a defect of parties plaintiff and defendant, and that the plaintiff and defendant are one and the same identical person, and that there was no cause of action stated.

He also demurred to the second cause of action set forth for lack of jurisdiction, and because there was another proceeding pending between the same parties for the same cause,—that is, the settlement of the account of plaintiff and defendant as executrix,—and her claim as widow for an allowance was pending at the time in the same court in which this action was instituted; also upon the ground of a defect of parties as stated in the demurrer to the first cause of action.

The court sustained the demurrer to both causes of action, and, plaintiff having elected to stand upon her complaint, judgment was entered against her and in favor of defendant. The plaintiff appeals from the judgment and order of the court sustaining the demurrer to the complaint.

S. De Wolfe, for Appellant.

John L. Baldwin, and *John W. Cotter*, for Respondent.

I. This action is not within the purview of section 167, second division, probate practice act, compiled statutes of Montana, 1887. The complaint does not show that the executrix was at any time a creditor of the decedent. No administratrix or executrix shall purchase any claim against the estate she represents. (Probate Practice Act, § 252.) An executrix or administratrix acquires no right of subrogation by purchase of a claim against the estate she represents. (7 Am. & Eng. Ency. of Law, page 314 and note.) The policy of the law is to prevent an executrix from being placed in a position which would bias her against the discharge of her duties. (2 Law R., R. & P., § 728; *Mossely v. Lane*, 62 Am. Dec. 752.) No one can be both plaintiff and defendant in the same action. (Barber on parties, page 18; *Trustees v. Stewart*, 27 Barb. 553; *Blaisdell v. Ladd*, 14 N. H. 129; *Byrne v. Byrne*, 94 Cal. 576, 29 Pac. 1115, 30 Pac. 196.) "It is a first principle that in whatever capacity a person may act, he never can contract with himself, nor maintain an action against himself." (*Eastman v. Wright*, 6 Pick. 316; *Brown v. Mann*, 71 Cal. 192; *Byrne v. Byrne*, 94 Cal. 576.) If the executrix were dissatisfied with such order of the court, her only remedy was by an appeal therefrom. (§ 324, page 354, Compiled Statutes of Montana, 1887.) Where a claim is rejected, the executrix's only remedy is to resign and bring suit as any other creditor. (Alexander and Joseph's Probate Law and Practice, page 241; citing, *Wilkins v. Wilkins*, 1 Wash. Ter. 87.)

II. The order refusing to grant an allowance to the widow was appealable. (Code of Civil Procedure, Sec. 421, 444; *In re McFarland's Estate*, 10 Mont. 445, 452.) The order refusing to grant an allowance to the widow being an appealable order, and the time having been allowed to pass, it cannot be reviewed in the manner in which the appellant now seeks to have it reviewed. (*In re Stephens' Estate*, 83 Cal. 322, 326; *In re Stotts' Estate*, 52 Cal. 403; *In re Coutts' Estate*, 87 Cal. 480, 482.)

HUNT, J.—Mrs. Phillips is suing herself, her contention being that under our statutes she may personally bring an ac-

tion for moneys alleged to be due to her as an individual against herself acting in her trust capacity. But how can a party be legally interested in each side of a question? How can Mrs. Phillips verify her complaint that the moneys she has sued for are due, and that the amounts are reasonable, and consistently resist payment thereof by verifying an answer to the effect that the claims are not due, and are not reasonable, if such be the case? Manifestly, on principle, the law will not permit a party to be both plaintiff and defendant in an action. Chit. Pl. *47.

Mrs. Phillips, in her capacity as executrix, is a trustee for heirs, legatees, and devisees, and her duty was not to enter into any relation, or to do any act, not consistent with the interests of the beneficiaries of her trust. As executrix her relation was a confidential one. Her duty, therefore, was undivided to her beneficiaries, and she could not put herself in the conflicting attitude of a plaintiff suing herself as a defendant, and thus subject herself to the temptation of acting contrary to the best interests of the legatees, her *cestuis que trustent*. (Pomeroy's Eq. Jur. § 1077; *Byrne v. Byrne*, 94 Cal. 576, 29 Pac. 1115, and 30 Pac. 196.)

We are unable to agree with the appellant that these general principles just stated are relaxed by section 167 of the probate practice act (Comp. St. 1887, 2d div.), which provides: "If the executor or administrator is a creditor of the decedent, his claim, duly authenticated by affidavits, must be presented for allowance or rejection to the probate judge, and its allowance by the judge is sufficient evidence of its correctness; and it must be paid as other claims, in due course of administration. If, however, the probate judge rejects the claim, action thereon may be had against the estate by the claimant, and summons must be served upon the probate judge, who may appoint an attorney at the expense of the estate to defend the action. If the claimant recovers no judgment, he must pay all costs, including defendant's fees."

The statute must be read as it is. It enables an adminis-

trator to collect a claim if the decedent was his debtor, but makes no provision for the presentation of claims paid by an administrator or executor after death and in the course of administration. It cannot be construed in a manner to allow this action to stand, without countenancing rules in conflict with principles essential to the safety and preservation of the estates of decedents.

The views here expressed are alike applicable to both causes of action stated in the complaint, and lead to an affirmance of the judgment.

Plaintiff must have had, and possibly may yet have, some means of obtaining reimbursement from the estate for a reasonable outlay in the funeral expenses of her husband. But it would seem to lie in the accounting and appeal from the order of the court disallowing her claim. (Comp. St. 1887, 2d div. § 445; Redfield's Law and Practice of Surrogate Courts, p. 439.) In good conscience she should be allowed what is reasonable, particularly if the exigencies of the case were such that to obtain a place of interment an advance of money was made by her individually.

It would also seem that under the statutes her remedy for the refusal of the court to make her an allowance was by appeal. But she cannot maintain this action. Judgment affirmed.

Affirmed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

IN RE PHILLIPS' ESTATE.

[Submitted May 18, 1896. Decided June 1, 1896.]

18	311
25	284
26	379

18	311
27	240

EXECUTORS—Appeal—Partial distribution.—An executrix may appeal in her representative capacity from an order directing a partial distribution of the estate. (*In re McFarland's Estate*, 10 Mont. 446, cited; *In re Dewar's Estate*, 10 Mont. 422, distinguished.)

SAME—Appeal from order of partial distribution.—On an appeal by an executrix in her official capacity, matters affecting her personal share of the estate as the widow of the decedent and as a legatee, are not brought before the appellate court for review.

SAME—Partial distribution.—An order directing the partial distribution of an estate will be sustained on an appeal by the executrix, where it appeared that, after deducting the amount to be distributed from the balance in the hands of the executrix, as shown by her final report, there remained a sufficiency to pay a legacy to her as widow, and all expenses of administration as well as her claim for an allowance for support during the settlement of the estate.

SAME—Partial distribution—Objections by executrix.—It is no objection to an order directing the partial distribution of an estate, that the final account of the executrix had not been allowed, and hence it could not be known what amount was subject to distribution, where the order was conditioned upon the giving of a bond to the executrix to indemnify the estate.

SAME—Same.—The pendency of a suit brought by the executrix in her personal capacity against herself in her representative capacity to recover for moneys paid for funeral expenses, whereby the amount subject to distribution was rendered uncertain, was properly ignored by the court as an objection to an order of partial distribution, where it had already been decided that such action could not be maintained.

WILLS—Legacy—Testator's intent.—By a clause in a will which provided that "Under none of the provisions of this, my last will, shall the share of my wife be less than \$7,000," inclusive of certain described life insurance amounting to \$5,000, it was the testator's intent that his wife should be a preferred legatee in the sum of \$2,000, to be paid out of his estate.

ADMINISTRATION—Allowance to widow.—*Semble*, a widow is entitled as a matter of right to a reasonable allowance during the progress of the settlement of the estate, and her financial ability to support herself without such aid is immaterial in determining her right to such allowance.

Appeal from Second Judicial District, Silver Bow County.

PROBATE PROCEEDING. An order directing a partial distribution of the estate was made by McHATTON, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an appeal by Anna M. Phillips, as executrix of the will of Geo. W. Phillips, deceased. Mary A. Snively, a legatee, under the will of Geo. W. Phillips, and Henry Camp, acting for several other legatees, applied to the court for a partial distribution. The petition of Mary A. Snively sets

forth that the executrix on the ——— day of February, 1894, filed her account, denominated an "annual account"; that the same was allowed and settled on the 28th day of April, 1894, with the exception of certain items therein, which were disallowed; that it appeared from said account so allowed by the court, that the claims against the estate amounted to \$4,943.70, and that the assets of the estate, in cash collected, amounted to \$12,354, leaving a balance to the credit of the estate of over \$9,000, subject to distribution; that notice to creditors was duly given; that the time for filing claims against the estate had passed; and that all claims, allowed and disallowed, amounted to \$4,943.70. It also set forth that the estate is but little indebted, and that the legacies may be paid by partial distribution.

Anna M. Phillips, executrix, objected to the order of distribution, "said objection being made as well on her own personal behalf, as a legatee under the will of the said Geo. W. Phillips, deceased, and also as a claimant against said estate, as in her capacity as executrix of the will of said George W. Phillips, deceased." Her grounds of objection as executrix were that her accounts had not yet been passed upon, and that there was litigation pending, involving allowances sued for in *Phillips v. Phillips*, ante, page 305. In her individual capacity she objects because the will made her a principal legatee, and bequeathed to her in no event less than \$7,000, inclusive of two policies of insurance, amounting to \$5,000, and because all other bequests made in the will are subject to said bequest. She also objected because, if distribution be made before the final determination of the suit above referred to, it could not be determined, in advance, whether or not there would be enough remaining to pay the amount bequeathed to said Anna M. Phillips under the will. The executrix asked, also, that the will be considered by the court in deciding the application for distribution.

S. De Wolfe, for Appellant.

John W. Cotter, for Respondent.

An executrix or administratrix in her official capacity cannot appeal from an order entering a decree of distribution. (*In re Dewar's Estate*, 10 Mont. 422, 424; *Bates v. Ryberg*, 40 Cal. 463; *Estate of Wright*, 49 Cal. 550; *Estate of Marrey*, 65 Cal. 287; *Merrifield v. Longmire*, 66 Cal. 180.) The fact that the administratrix has an interest as an individual in the estate as one of the legatees will not entitle her to prosecute this appeal as such executrix. (*In re Dewar's Estate*, 10 Mont. 422, 424; *Bates v. Ryberg*, 40 Cal. 463; *Estate of Marrey*, 65 Cal. 287; *Merrifield v. Longmire*, 66 Cal. 180.) The record not showing the facts upon which the court made the finding and order, and all of the proceedings appearing regular upon their face, and the facts found by the court showing that the condition of the estate warranted the court in making the order, the order should be affirmed. (*Estate of Kelly*, 63 Cal. 106; *Estate of Dunn*, 65 Cal. 378.) Upon the filing of the petitions for partial distribution, and the facts found by the court as recited in the order, which is conclusive upon this appeal, as we submit, the court was warranted in ordering a partial distribution. (Probate Practice Act, Sec. 284; *Estate of Prichett*, 52 Cal. 94; Schouler on Executors and Administrators, Secs. 504, 527.)

William Scallon, for Respondent Snively.

HUNT, J.—It is argued by the respondents that this appeal will not lie because it was taken by Anna M. Phillips in her capacity as executrix of the will of her husband. To support the argument the case of *Dewars' Estate*, 10 Mont. 422, is relied on. There the administrator appealed from an order sustaining certain objections to the administrator's final account, and from the decree of distribution. It was decided that in his official character the appellant had no interest in the decree of distribution, and his appeal was therefore dismissed. No statute was cited giving the administrator any right to resist the proceeding or order of the court appealed from. But in this case the appeal is from an order of *partial* distribution, applied for under sections 284, 285, Probate

Practice Act (Comp. St. 1887), where, after the lapse of four months from the issuing of letters testamentary, a legatee may, upon giving certain security, apply for the legacy or share of the estate to which he is entitled.

By section 286 of the Code such an application may be resisted by the executor or any person interested in the estate. It was so decided in *Estate of Kelley*, 63 Cal. 106, upon an appeal from an order of partial distribution made under a statute of that state (section 1660, Code Civ. Proc. Cal.), precisely like section 286 of the Montana Probate Code. The reason of the statute must be that the executor, who is strictly bound to see to it that the estate is preserved for distribution to creditors and others who may be entitled thereto upon final distribution, is interested in resisting any order of distribution, made before final settlement, by which the assets of the estate may be dissipated to the injury of creditors' rights. But, when final distribution is ordered, and his official trust is about terminated, and the creditors have had full time to present their claims, and all claims have been presented, and the heirs and legatees are in court, having done his duty by preserving the estate for distribution, then, as executor, he can have no interest in a claim of one legatee as against others, at the expense of the estate.

This appellant, therefore, had the right to appeal, as executrix from the order allowing a partial distributive share of the estate to the respondents. (Code Civ. Proc. 1887, § 445; *In re McFarland's Estate*, 10 Mont. 445.)

But as the appeal was taken by her in her official capacity we are limited to the consideration of any matters affecting her as executrix of the estate. In her individual capacity she does not appeal. Matters affecting only her personal share of the estate, as the widow of decedent, and as a legatee, are, therefore, not before us. (*Merrifield v. Longmire*, 66 Cal. 181, 4 Pac. 1176; *Estate of Marrey*, 65 Cal. 287, 3 Pac. 896; *In re Jessup*, 80 Cal. 625, 22 Pac. 260.) But, as executrix, she has no cause of complaint. In her objections she states that, by her final report filed, the balance in her

hands is \$9,659.05. Of this amount \$4,100 was ordered distributed to the legatees under the will, leaving in her hands \$5,559.05. This \$5,559.05 is sufficient to cover \$2,000 payable to the widow by the eighth clause of the will, besides all expenses of administration, and will still leave enough to cover the claim of the widow for a reasonable family allowance, if, by the statute, she is entitled to the same. As executrix, therefore, Mrs. Phillips is not aggrieved.

One of the appellant's objections particularly set forth, is that she had presented her final account as executrix, but the same had not been acted upon by the court; hence it could not be known what amount remained in the hands of the executrix subject to distribution, nor what amount should be paid to the several legatees under the will. This is answered by the record fact that the respondents only asked a partial distribution, as contemplated by law, and were only awarded a partial distribution upon giving bond to the executrix to indemnify the estate. Presumably the court made the decree upon a showing which warranted the order. If appellant were correct, and partial distribution can only be had after final accounts are allowed, there would be no use of the proceeding for a partial distribution, and the benefits of the statutes might be entirely lost. It was to avoid the hardship often incident to the long delays of the final accounting that, upon a sufficient showing, partial distribution might be had.

The next principal objection made by the executrix is that an action was pending against the executrix to recover the sum of \$2,521.25 for moneys paid by the appellant in her individual capacity to defray funeral expenses of the decedent, and that until that action was decided, the court could not determine the amount of the funds which would be subject to the payment of the legacies contained in the will, or whether there would be sufficient to pay the partial amount directed to be paid by the order of the court appealed from in this case. The decision in the case of *Phillips v. Phillips, Executrix, ante*, page 305, is that the plaintiff could not maintain the action referred to. The court, therefore, properly ignored

the above mentioned suit of Mrs. Phillips, and her objections on account of its pendency, and included the sum of \$2,521.25 in the estimate of funds in the hands of the executrix.

We have referred to a payment to the widow under the eighth clause of the decedent's will. It is doubtful whether the will is before us at all for direct construction; but, as the meaning of the testator's language was argued by counsel; and as our opinion will doubtless facilitate the final settlement of the estate, which is desired by all parties, we have considered the provision in dispute. The decedent, after directing the payment of the expenses of his last sickness and funeral, and the payment of the allowance by law made to his family surviving him, and all his just debts, bequeathed to his wife, Anna M. Phillips, all his property, "she to pay the bequests following." Then followed bequests to his brother, his parents, a friend, and, in case of his death by accident, certain additional bequests to his sister and her daughter. By the eighth clause of the will the testator provided as follows: "Under none of the provisions of this, my last will, shall the share of my wife, Anna M. Phillips, be less than \$7,000, inclusive of the \$3,000 policy on my life in the Royal Arcanum, and another \$2,000 policy on my life in the Ancient Order of United Workmen, payable now to her."

We think the testator intended, by the language quoted, that his wife should be a preferred legatee in the sum of \$2,000, to be paid out of his estate. We regard the references to the policies of life insurance as recognitions of the fact that, by adding \$2,000 of his money to the \$5,000 insurance to come to her as her own, she would be comfortably provided for. The testator simply desired that, when he died, his wife should be worth the sum of \$7,000,—\$5,000 of her own by policies, and \$2,000 from his estate.

As said before, the matter of the allowance by the widow not being before the court by this appeal, no decision is made upon the action of the district court in disallowing her claim of allowance. It would seem, however, by a recent decision of the

supreme court of California (*in re Lux's Estate*, 100 Cal. 593, 35 Pac. 341), that the widow was entitled, as a matter of right, to a reasonable allowance during the progress of the settlement of the estate, and that her financial ability to support herself without aid from the estate is immaterial in considering the question of her right to such allowance. Judgment affirmed.

Affirmed.

PEMBERTON, C. J. concurs. DE WITT, J., not sitting.

PARBERRY, RESPONDENT, v. WOODSON SHEEP COMPANY, FIRST NATIONAL BANK OF WHITE SULPHUR SPRINGS, INTERVENOR,
APPELLANT.

[Submitted May 22, 1896. Decided June 1, 1896.]

ATTACHMENT—Interventio:—Corporation—Purchase of stock.—Where a creditor holding junior attachment on defendant's property, intervened in the action of the prior attaching creditor against the defendant and alleged that the notes sued on by the original plaintiff were given by the defendant company as the consideration for the pretended purchase by it of the plaintiff's stock in the company, and were void, a finding that the notes were not given for the stock, but for real and personal property sold by the plaintiff to the defendant company, is supported by evidence that at the time of the organization of the company, the capital stock of which consisted of 150,000 shares, the three trustees issued to themselves each one share of the capital stock of the company and a certificate for the balance of the stock to the plaintiff, upon which was endorsed an assignment transferring the stock to the company, which plaintiff immediately signed and redelivered; that the transaction was at the request of the trustees and done for their accommodation and wholly without consideration, and that thereafter the defendant company purchased of the plaintiff real estate and personal property, paying therefor part cash and the balance in the notes sued on with 125,000 shares of its capital stock as collateral security.

SAME—Water of security.—A finding that the claim of an attaching creditor, for which the defendant company had issued stock as collateral security, was not secured by any mortgage, lien or pledge upon real or personal property, at the time of the commencement of his action, is supported by evidence that the defendant company was then in debt \$38,000 with assets estimated at from \$25,000 to \$49,000; that plaintiff, prior to beginning suit, mailed the stock which he considered of no value to the company's president; that the latter was then absent from the state, and the stock was re-mailed to plaintiff by another person, who appeared to represent the president of the company, and was received by a person in plaintiff's office and never actually returned to plaintiff; that on the return of the company's president the stock was delivered to him and retained without objection. In such case the plaintiff could waive his rights to the pledge of the stock as security for his debt and attach the defendant's property.

18 317
d18 567

Appeal from Ninth Judicial District, Meagher County.

ACTION by intervening creditor to determine priority of attachment liens. The case was tried before HENRY, J. Plaintiff had judgment below. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action by attachment, commenced in the district court of Meagher county, by the plaintiff against the defendants, on the 29th day of January, 1894, to recover the sum of \$34,763.78 on certain promissory notes. The attachment affidavit is in the usual form, and the last clause of it reading as follows: "And that the same is now due, and that the payment of the same is not secured by any mortgage, lien, or pledge upon real or personal property." The writ was levied upon the property belonging to the defendant sheep company, and is the first in point of time. The summons in the action was duly served. The sheep company appeared in the action, and demurred to plaintiff's complaint. February 24, 1894, the intervenor also began an attachment suit against the Woodson Sheep Company. On the 26th day of February, 1894, the intervenor filed its complaint in intervention in the case. On this last day, plaintiff was permitted to amend his affidavit in attachment. Such amendment consisted in the statement to the effect that at one time plaintiff had 125,000 shares of the capital stock of the sheep company as collateral security for his debt, and that he had returned the same to the company before commencing this suit, and further facts showing that such stock was nugatory and worthless by reason of insolvency of said sheep company; such insolvency having arisen subsequent to the original pledge of the stock by the company's incurring further indebtedness, and by reason of its disposing of part of its property, and by reason of great depreciation in value of the residue.

The intervenor, in its complaint of intervention, contends that, at the time plaintiff commenced his action by attachment, his claim was secured by the 125,000 shares of the capital

stock mentioned above, and that, therefore, he was not entitled to his attachment. The intervenor further alleges in its complaint that the defendant Woodson Sheep Company was organized about the 3d day of July, 1891, with a capital stock of \$150,000, divided into 150,000 shares, of \$1 each; and that shortly after such organization, plaintiff purchased 149,997 shares of the capital stock thereof; and that a certificate therefor was thereupon duly issued and delivered to said plaintiff by said corporation; and that thereafter plaintiff made a pretended sale of 149,997 shares of said capital stock to said corporation, at the agreed price of \$72,000, and received for said stock different notes, upon which he brings this action, as a part of the consideration therefor; and that the sole consideration for said notes was the transfer of said shares of stock to said defendant, but of which fact and transaction this intervenor had no knowledge or intimation until long after said indebtedness of said Woodson Sheep Company to the intervenor had been incurred, and by reason thereof the intervenor contends that the notes sued on are null and void.

The record shows that on February, 1891, the plaintiff was the owner of a large quantity of property, consisting of real estate contracts with the Northern Pacific Railroad Company for the purchase of certain railroad lands, sheep and ranch equipments, such real estate amounting to some 8,000 acres, and the personal property consisting of 14,600 head of sheep, and considerable other property.

On July 3, 1891, John A. Woodson, Waller Shobe and W. B. Baker organized the Woodson Sheep Company. On July 14th, in said year, the first meeting of said persons, as trustees of said company, was held. To complete their organization, these gentlemen issued to themselves each one share of the capital stock of the company, and 149,997 shares to the plaintiff. At the time the certificate for the 149,997 shares was issued to plaintiff, it had indorsed upon it an assignment or words transferring the stock to the company, which at the request of the trustees, was immediately signed by the plaintiff, and the certificate redelivered by him to the company. The

plaintiff had never subscribed for any of the stock of the company. The transaction above stated appears to have been solely at the request of the gentlemen named as trustees of said company, and for their accommodation, and without any other consideration or for any other purpose. At that time the company had not yet commenced to do business, nor had it any assets or debts. Prior to said 14th of July, there had been some negotiations between the gentlemen mentioned and the plaintiff looking to the purchase of the real and personal property of the plaintiff. Such purchase was consummated on August 14, 1891; the company paying therefor \$12,280 in cash, and delivering their three notes dated July 15, 1891, and being, respectively, for \$9,146, \$22,550 and \$24,803. As collateral security, the company delivered to plaintiff 125,000 shares of its capital stock. These shares of stock were the only security held by plaintiff for this indebtedness. These notes were partly paid before the commencement of this suit, leaving the amount sued for unpaid.

The Woodson Sheep Company became indebted to intervenor in October, 1893. At the time plaintiff commenced this suit, the defendant company was in debt \$88,000, and its assets were estimated at from \$25,000 to \$49,000. Prior to the beginning of this suit, the plaintiff returned the stock held by him as collateral security to Woodson, the president of the defendant company, because he considered it of no value. Plaintiff placed the stock in an envelope, and directed it to John A. Woodson, White Sulphur Springs. At that time Woodson was absent from the state, in Chicago. The lot was received by a Mrs. Baker, who seemed to represent Woodson, and she remailed the stock to the plaintiff. The stock, however, was received by a Mr. Hampton, in plaintiff's office, and was never actually returned to plaintiff; but, on Woodson's return from Chicago, the stock was delivered to him, and he kept possession without objection, and had possession of it at the time this suit was tried.

The case was tried by the court without a jury. The court found as a fact that the notes sued on by plaintiff were not

given for the stock of the Woodson Sheep Company, but for the property embracing real estate, sheep and other personal property sold by plaintiff to the Woodson Sheep Company. The court also found, as a matter of fact, that, at the time of the commencement of plaintiff's action, his claim was not secured by any lien, pledge or mortgage on any personal or real property; and, on these findings, the court rendered judgment in favor of plaintiff.

The intervenor made a motion for a new trial, which was overruled, and from the judgment and order overruling the motion for a new trial the intervenor appeals.

McConnell, Clayberg & Gunn, Smith & Gormley, and Thompson & Maddox, for Appellant.

I. The affidavit for attachment is jurisdiction. It must be sufficient under the statute to authorize the issuance of the writ and must be true in fact or the proceeding is void. (Waples on Attachment, §§ 112, 143, 157; Drake on Attachments, §§ 86, 87 and 89; *Murphy v. Montandon*, 29 Pac. 851; *Mentzer v. Ellison*, 43 Pac. 464.) Where, therefore, a plaintiff has had security for his claim, but the security has become insufficient or nugatory, the statement in an affidavit for attachment that the payment of the claim "is not secured by any mortgage, lien or pledge upon real or personal property" is untrue, because under the statute the ground upon which the writ is asked does not exist. (*Murphy v. Montandon*, 29 Pac. 851; *Mathews v. Densmore*, 43 Mich. 461; *Gessner v. Palmateer*, 89 Cal. 89; *Willman v. Friedman*, 35 Pac. 37.) An affidavit in the alternative is not good. (*Wilke v. Cohn*, 54 Cal. 212; *Elling v. Kirkpatrick*, 6 Mont. 119.) Where the security has become insufficient or nugatory by the act of the plaintiff, he is not entitled to an attachment. (*Puge v. Latham*, 63 Cal. 75; *Beaudry v. Vache*, 45 Cal. 3.)

II. Plaintiff undertook to cure the infirmities of the original affidavit by the filing of an amended affidavit. The amendment was unauthorized because (1) the original affidavit was void; (2) because appellant had acquired a lien upon the

property of the said Woodson Sheep Company by virtue of its writ of attachment and filed its complaint in intervention, attacking plaintiff's attachment before said amendment was offered or made. (*Whitney v. Brumette*, 15 Wis. 57; *Witte v. Meyer*, 11 Wis. 300; *Drake on Attachments*, §§ 113, 87, 89; *Winters v. Pearson*, 72 Cal. 553; *Rupert v. Haug*, 87 N. Y. 141.)

III. It is well established that where the writ was issued without jurisdiction a subsequent attaching creditor can take advantage of this fact. (*National Papetire v. Kinsey*, 23 Atl. 275; *Bateman v. Ramsey*, 12 S. W. 235; *Davis v. Eppinger*, 18 Cal. 379; *Speyer v. Thurles*, 21 Cal. 227; *Coghill v. Marks*, 29 Cal. 673.)

IV. The provisions of the statute as to what a process shall contain are mandatory, and a failure to observe the same renders the process void. (*Place v. Riley*, 98 N. Y. 1; *Sawyer v. Robertson*, 11 Mont. 416; *Sidwell v. Schumacher*, 99 Ill. 433.)

V. The notes described in plaintiff's complaint were executed and delivered by the defendant corporation in payment for 149,997 shares of the capital stock of said company theretofore issued to the plaintiff and were therefore void. Even in the absence of a statutory prohibition a corporation cannot purchase or deal in its own stock. (*Morowetz on Corporations*, §§ 112, 431, 434, 793; *Crandall v. Lincoln*, 52 Am. Rep. 560; *Copen v. Greenlease*, 38 Ohio St. 275; *Heggie v. Loan Association*, 12 S. E. 275; *Union National Bank v. Douglas McCrary*, 86; *Glenn v. Scott*, 28 Fed. 804; *German Savings Bank v. Wulfekuhler*, 19 Kan. 60; *Bank of Ft. Madison v. Alden*, 129 U. S. 372; *Abeles v. Cochran*, 31 Am. Rep. 194; *State v. Association*, 35 Ohio St. 263; *Morgan v. Lewis*, 17 N. E. 568; *Thompson on Corporations*, § 2054 *et seq.*; *Galvin v. MacM. Co.*, 14 Mont. 508; *Cook on Stock and Stockholders*, § 312; *In re Columbia Bank*, 23 Atl. 626.) The English authorities are unanimous in support of the doctrine that a corporation can not purchase or deal in its own stock. (*Brice on Ultra Vires*, 94; *Beach on Corporations*, section 395.)

VI. Although intervenor was not a creditor of the corporation at the time of the pretended sale of said stock and the execution and delivery of the notes in question to the plaintiff Parberry, it has a right to complain of such transaction upon the principle that the capital or assets of a corporation is a trust fund for the benefit of creditors, and any distribution of such fund to, or withdrawal thereof by, its stockholders is a wrong upon subsequent as well as existing creditors. (*Kohl v. Lilienthal*, 81 Cal. 378; *Williams v. Boice*, 38 N. J. E. 364; *McKusick v. Seymour*, 50 N. W. 1116; *Alling v. Ward*, 24 N. E. 551; Cook on Stock, Secs. 42 and 199.)

Max Waterman and *H. G. McIntire*, for Respondent.

I. The plaintiff had the right to return his security if he saw fit to do so. (Drake on Attachment, 6th Ed. § 35; *Woody v. Jamieson*, 40 Pac. 61.) Our statute expressly permits an attaching creditor to disregard nugatory or inadequate security. (Compiled Statutes p. 104, § 181; *Elling v. Kirkpatrick*, 6 Mont. 119.) The affidavit was amendable. (*Joseph v. Mady Clothing Co.*, 13 Mont. 203.) It is true that under certain contingencies a creditor is permitted to intervene in an attachment suit and assail the validity of a prior attachment, but this right is confined to such irregularities as affect substantial rights of the creditor, such as which if allowed to prevail would be a fraud upon him, as for instance, where the debt sued on is fictitious, or fraudulent, or prematurely brought. (Drake on Attachment, 6th Ed. Sec. 273; *Waples on Attachment*, p. 477; *Fridenberg v. Pierson*, 18 Cal. 155; *Patrick v. Montador*, 13 Cal. 444; *Leppel v. Beck*, (Colo.) 31 Pac. 186; *Foster v. Jones*, 1 McCord, 116; *Nenny v. Schluter*, 62 Tex. 329; *Rudolf v. McDonald*, 6 Neb. 164; *Orr v. Lindsey Shoe Store*, 18 S. W. 309; *Gilkerson-Sloss Com. Co. v. Bond*, 11 So. Rep. 221.)

II. In the absence of express statutory prohibition a company may purchase its own stock. This conclusion has been reached by every court that has had the question before it, with possibly the exception of those of two or three states.

(Cook on Stocks, Etc. (2nd Ed.) § 311; Boone on Corporations, § 107; Beach on Corporations, 395; *Ex Parte Holmes*, 5 Cowen, 426; *City Bank v. Bruse*, 17 N. Y. 507; *American R. Co. v. Haven*, 101 Mass. 398; *Dupee v. Boston Water Power Co.*, 114 Mass. 37; *Coleman v. Columbia Oil Co.*, 51 Pa. St. 74; *Chicago Etc. R. R. Co. v. Marsielles*, 84 Ill. 145; *Clapp v. Peterson*, 104 Ill. 220; *Fraser v. Ritchie*, 8 Bradw. 554; *Hartridge v. Rockwell*, (Ga.) R. M. Charlton 260; *Blalock v. Kernersville Mfg Co.*, (N. C.) 14 S. E. Rep. 501; *Snyder v. Trinitas Petroleum Co.*, (Cal.) 13 Pac. 479; *Bank v. Transportation Co.*, 18 Vt. 138; *First Nat. Bank v. Salem Capital Flour Mills Co.*, 39 Fed. p. 96, (a case from Oregon); *Iowa Lumber Co. v. Foster*, 49 Ia. 25, S. C. 31 Am. Rep. 140; *Rollins v. Shaver Wagon and Carriage Co.*, (Iowa) 45 N. W. Rep. 1037.) The reason given by such cases as hold the contrary is that by a sale to the corporation the stockholder's statutory liability to corporation creditors is destroyed. (*Coppin v. Greenleese*, 38 Ohio St. 275.) But no such reason can be advanced in Montana, for here the stockholder's liability is only for the amount he may owe the company for unpaid stock subscriptions. (Comp. St. p. 727, Sec. 457.)

PEMBERTON, C. J.—The counsel for appellant contend that the findings of the court, set out substantially in the statement, are not supported by the evidence. It appears that the only thing plaintiff ever did tending to show that he was ever the owner or purchaser of any of the stock of the defendant company was to receive a certificate of the stock of the company from the hand of the president, which certificate had on the back of it an endorsement transferring the stock back to the company, and to sign such endorsement, and hand the certificate back to the president. It was shown that there was no consideration demanded, paid, promised, or contemplated in this transaction; that there was no agreement ever proposed, much less entered into, by which the company was to sell, and plaintiff to purchase, any stock of the company. The

evidence is that he did not purchase any stock of the company. He permitted the trustees to issue to him the certificate of stock, with the understanding that he should immediately transfer it back to the company, for the sole purpose of accommodating the trustees in organizing the company. There could be no sale or purchase of the stock ordinarily unless there was an agreement in the minds of the parties to that effect. (21 Am. & Eng. Enc. Law, p. 9446, and authorities cited.) There is not in the evidence a pretense of any such agreement of the minds of the parties in this case. We therefore think there was ample evidence to support the finding of the court that the notes sued on by plaintiff were given for the property sold by plaintiff to the defendant company, and not for the stock of said company. To hold that by reason of the transaction between the parties in relation to the receipt and transfer of the certificate of stock, as shown above, plaintiff actually became a purchaser of the stock of the company; that his immediate transfer of the stock back to the company constituted a purchase by the company; that the notes sued on by plaintiff were given in consideration of the sale of said stock to the company, and are therefore null and void, for want of authority of the company to purchase its own stock,—would be, in effect, to hold that the plaintiff should, by such transaction, lose the property he sold to the company, forfeit his right to recover on the notes in suit, and render himself liable for the difference between the value of the property he sold to the company, to-wit: \$72,000 and \$149,997, the par value of the stock the appellant contends he purchased, and for which it is contended he executed the notes he is seeking to collect. Such a holding we think absolutely abhorrent to every principle of law, equity, and justice.

We think, too, that the finding of the court that plaintiff's debt was "not secured by any mortgage, lien, or pledge upon real or personal property" at the time of the commencement of this suit is amply supported by the evidence, the substance of which is contained in the statement, and need not be restated here. The plaintiff had the right, we think, to waive his

rights to the pledge of the stock to secure his debt and attach the property of the defendant company, to satisfy the debt for which the stock was pledged. (Drake on Attachment, (7th Ed.) § 39, and authorities cited; *Buck v. Ingersoll*, 11 Metc. (Mass.) 226; *Wooddy v. Jamieson*, (Idaho) 40 Pac. 61.)

The appellant contends that the trustees of the defendant company had no authority to execute the notes sued on by plaintiff, and that they were null and void, because given for the stock of the corporation; that the giving of the notes by the corporation was an act *ultra vires*.

It is also contended by the appellant that the court erred in permitting the plaintiff to amend his affidavit for attachment after the intervention of the intervenor.

Having held that the findings of the court are supported amply by the evidence, and believing that these findings are decisive of the real issues of the case, we deem it entirely unnecessary to treat these or any other errors assigned by appellant.

We think the case was fairly tried and the proper result reached by the trial court. The judgment and order appealed from are affirmed.

Affirmed.

HUNT, J., concurs. DE WITT, J., not sitting.

SWEENEY, RESPONDENT, v. SCHLESSINGER, APPELLANT.

[Submitted May 27, 1896. Decided June 1, 1896.]

JUDGMENT CREDITOR—Action against garnishee—Sufficiency of answer.—In an action by a judgment creditor against the judgment debtor, and other defendants alleged to have money belonging to the judgment debtor, where the complaint shows the rendition of the original judgment, the issuance of execution and levy by garnishment upon the co-defendants and their refusal as garnishees to pay over the money, and alleges that such money belongs to the judgment debtor individually, an answer which alleges, in effect, that the garnishees have money due upon a purchase of property from the judgment debtor, but as to whether it belongs to him personally or in a representative capacity they have no knowledge, raises no issue.

SAME—Same—Pleading—Allegation of permission to sue.—In an action brought under section 356 of the Code of Civil Procedure (1887) providing that if it appear that a per-

son or corporation alleged to have property of the judgment debtor claims an interest therein adverse to him or denies the debt, the court "may authorize, by an order to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt," it is not necessary for the plaintiff to allege as a part of his cause of action that an order was made by the court permitting the action to be brought.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION by judgment creditor. Judgment on the pleadings was rendered for the plaintiff below by HUNT, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an appeal from a judgment rendered upon the pleadings, and also an appeal from an order refusing to open the default of defendant Welch. The complaint of the plaintiff alleges that he had, in another action, recovered judgment for \$662.30 against the defendants Schlessinger and Welch; that an execution was issued upon that judgment; that at that time E. D. Edgerton, defendant in this action, was indebted to defendant Welch in the sum of \$1,250, and that the defendant herein, the bank, had \$1,200 in its possession belonging to said Welch; that the execution was levied upon said funds by delivering to said Edgerton and the cashier of the bank the proper garnishment papers; that said Edgerton and the bank refused to pay said funds to the sheriff, averring as a reason for said refusal that defendant Welch claimed an interest in said money as administrator of the estate of Alice Welch, deceased.

The complaint further alleges that said funds do not belong to Welch as administrator, but are his individual property. Judgment is demanded that said Edgerton and the bank be required to pay into court said money, and that the same be, as far as is necessary, applied to the satisfaction of the judgment formerly recovered against Schlessinger and Welch.

Schlessinger was not served with summons. Welch was served, but never appeared. His default was duly entered. The only answer filed in this case was by Edgerton and the bank. This answer denies that those defendants, or either of

them, are indebted to said Welch, or have in their possession any money belonging to him, but avers the facts to be as follows, to wit : That Edgerton purchased certain real estate: that negotiations were carried on with Edgerton by the defendant Welch, on behalf of the owners of said property, but whether Welch was acting for himself, or in a representative capacity, defendants do not know; that, as part of the purchase price of the real estate mentioned, Edgerton paid Welch, on behalf of the owners, \$1,200, which sum was deposited in the defendant bank, and is the money referred to in the complaint.

The answer says that Edgerton owes a balance on the purchase of this real estate. The answer then alleges that all of said moneys belong to whoever were the owners of said premises when Edgerton purchased the same, and are owing to and owned by them, and no other person, and that claims for said moneys have been made upon defendants prior to the commencement of this action, copies of which said claims, marked "Exhibits A and B," are attached to the answer. The fact is, however, that copies of these claims are not attached to the answer.

The defendant Welch having defaulted, plaintiff moved for judgment upon the complaint and answer, the material allegations of which pleadings are epitomized above. The appeal is from the judgment and order as above noted.

Toole & Wallace, for Appellants.

The order in question is not a *bare leave* to sue. At common law, there is no privity between a judgment creditor and his debtor's debtor. The privity is created by the order, so to speak, and is the very gravamen of the cause of action. (*Harlich v. Kauffmann*, 33 Pac. R. 857.) Being a fact constituting the cause of action it should be alleged. (Code of Civil Procedure, Compiled Statutes, §§ 85, 87, 88; *High v. Bank*, 95 Cal. 386.) All facts constituting the cause of action must be pleaded; while as matter of evidence the court perhaps could take notice of orders made in the former action.

Just what the court will take judicial notice of is not classified under pleadings, but under the head of evidence. (Code of Civil Procedure, Compiled Statutes, § 643 Rapalje's Law Dict. title "notice" and "judicial notice.") If the order constitutes an essential element in the cause of action and is not limited to the right to sue, at common law and under the code it should be alleged, and none of the authorities cited by respondent are applicable here. We think the action contemplated is an independent statutory action, based upon a liability created by the order and which did not theretofore exist. (Code of Civil Procedure, Compiled Statutes, § 356; Freeman on Judgments, §§ 393, 394; *Herrlich v. Kauffmann*, 33 Pac. R. 857, *supra*.) If so, the court aside from the question of pleadings, could not take judicial notice of the order, as a fact in the case if on trial. (*People v. De la Guerra*, 24 Cal. 73; *Lake v. Cowles*, 31 Cal. 215.) Under our statute this is an independent action and the ancillary proceedings left off with the order. Being therefore an independent action the court could not take judicial notice of the order, even as matter of evidence. Section 235, Code of Civil Procedure does not apply to a case like this. It refers to property capable of manual delivery and not an indebtedness. (*Hartman v. Alvera*, 51 Cal. 501.) That the order created the right to sue and recover just as the creditor could have done and did not enlarge the rights of either is axiomatic. It was an adjudication that the debt was denied and could not be made without it. (Herman on Estoppel, 306, § 286; *McCullough v. Clark*, 41 Cal. 298.) The order to sue and recover the debt was the only order that could be made. The liability to the creditor being created by statute was limited to that created by it. No other order could be made or action maintained. (*Lewis v. Chamberlain*, 41 Pac. 413 (Cal.); *McDowell v. Bell*, 86 Cal. 615, 25 Pac. 128; *Westside Bank v. Pugsley*, 47 N. Y. 368; *Brummagin v. Boucher*, 6 Cal. 16.) The complaint alleges that the garnishees claim that the judgment debtor asserts rights other than in his individual character and is the very fact set up in the answer of the garnishee. If the money had been paid into

court and there was no controversy about it then the trial court could have made the order that was made in this case, and not otherwise. (*Bank v. Hayes*, 29 Pac. R. 90; *Hagermann v. Long Lee*, 12 Nev. 366, and authorities there cited.)

T. J. Walsh, for Respondent.

A garnishee may either absolutely deny in his answer any indebtedness to the judgment debtor and take the chances of proving it at the trial, or he may admit that he has the money in his hands, pay it into court and interplead the claimants. (§ 23 Code of Civil Procedure.) The answer is evasive. (*Darson v. Maria*, 16 Pac. 413.) "Doubtful and uncertain answers are construed against a garnishee. It has been held that, where they are equivocal and evasive, the allegations would be taken *pro confesso*." (*Id.*, Wade on Attachment, 377; Drake on Attachment, 633.) It is contended that the complaint is insufficient because it does not allege that an order was obtained authorizing the institution of the suit pursuant to § 350, Code of Civil Procedure. Such an order was in fact made. As this action is merely auxiliary to the original action (*Strong v. Holton*, 39 Mich. 411), the court takes judicial notice of the proceedings had in it. (*Farrington v. Sexton*, 43 Mich. 454.) Wherefore it follows that there is no necessity to plead the existence of the order. (Waples on Attachment and Garnishment, 418.) See, also, Freeman on Executions, 418. It is an elementary rule that in a complaint facts should not be stated of which the court will take judicial notice. (Bliss on Code Pleadings, 177.) In many states a party is not entitled to sue on an obligation secured by mortgage without first obtaining leave of court. It is not necessary for him, however, to allege leave in his complaint. If leave has not been obtained the question must be raised by motion to dismiss or by plea in abatement. (*McKernand v. Robinson*, 84 N. Y. 105; *Finch v. Carpenter*, 5 Abb. Pr. 225; *Henry v. McCurdy*, 55 N. W. 261.) And this is the rule in every case whereby statute leave to sue is necessary, and unless objection is so made the irregularity is waived. (1 Wait's

Practice, 196; Riddle & Bullard on Supp. Proc., 412; High on Receivers, 261.) Even if attacked on demurrer, the complaint is not vulnerable, as "the obtaining of such permission is no part of the plaintiff's cause of action." (*Hantzsch v. Massolt*, 63 N. W. 1069; 1 Wait's Practice.)

DE WITT, J.—The motion to open the default of Welch was upon the ground of alleged excusable neglect. The motion was heard upon the affidavits of the respective counsel for Welch and the plaintiff. The respondent now contends that, by reason of some question of practice, the order denying the motion to open the default is not properly before us. But, without passing upon that question, we are satisfied to say that we cannot find any abuse of discretion in the order of the district court which would justify us in reversing it.

The other question is whether judgment should have been rendered upon the pleadings. That is all there is now before us. Appellant's counsel earnestly argue that Welch represents some minor heirs, as guardian, who are the owners of the funds in question, and that such minor heirs are by this judgment deprived of their property. Welch was sued as administrator, and no allegations as to his being guardian of minor heirs appear anywhere in the pleadings. No application to intervene was made. Such allegations appear only by the answer which Welch tendered upon his motion to open the default. The action of the district court in refusing to open this default, we are of opinion, as above noted, was not an abuse of discretion. Therefore the answer tendered by Welch never appeared in the case. Looking simply at the pleadings as they stand, we think that the judgment upon them was proper. Section 356 Code Civil Procedure, 1887, provides: "If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation, for the recovery of such interest or debt."

The complaint in this action shows that a person and a corporation, to-wit, Edgerton and the bank, were alleged to have property of the judgment debtor, Welch, and that they refused to pay said money into court, or have it applied upon the judgment. The complaint shows the rendition of the original judgment, the issuance of the execution, the levy by garnishment upon the bank and Edgerton, and the refusals of the garnishees to apply the funds. The complaint asked that these funds be applied to the judgment in the original case. The judgment in this case was in accordance with the demand in the complaint. What defense do we find set up against this complaint? Schlessinger and Welch made none. When the answer of the bank and Edgerton is analyzed, it makes no defense. The answer is introduced by an allegation that the defendants are not indebted to Welch, and have not in their possession any money belonging to him; but it goes on to say that "the facts are as follows," and what follows is a detailed statement as to how the garnishees are not indebted. It is that statement which we must analyze. Therein we find Edgerton and the bank saying that Edgerton negotiated with Welch for the purchase of certain real estate, but whether Welch was acting for himself, or in a representative capacity, the defendants do not know. The answer admits that Edgerton paid Welch \$1,200, and that the money is now in the defendant bank. The garnishees say that this money belongs to the former owners of the real estate, but that the garnishees do not know who the owners were. Reduced to a simple statement, the answer is no more than this: "We, the defendants and garnishees, have \$1,200 which belongs to Welch, either personally or as a representative, and we have no knowledge which." But the complaint positively avers that the money belongs to Welch individually.

We are of opinion that the answer does not raise any issue, and that the judgment on the pleadings was therefore correct. —(*Dawson v. Maria*, (Or.) 16 Pac. 413; *Wade on Attachment*, § 377; *Drake on Attachment*, § 633,—provided, however, that the complaint sets up a cause of action. And here we

reach the other point suggested by the appellants, to-wit, that the complaint itself is insufficient, in that it does not allege that the district court ordered this action to be commenced. (Code Civ. Proc. 1887, § 356.)

The answer does not plead that the order for the commencement of the action was not made, but appellants contend that the complaint should state that the order was made. In other words, is the order for the commencement of the action a part of the cause of action? The present action is auxiliary to the main action in which judgment was obtained against Welch. (Waples on Attachment, § 546; *Strong v. Hollon*, 39 Mich. 411; *Claflin v. McDermott*, 12 Fed. 375; *Stove Co. v. Shedd*, 82 Iowa 540, 48 N. W. 933; *Henry & Coatsworth Co. v. McCurdy*, 36 Neb. 863, 55 N. W. 261; *Farrington v. Sexton*, 43 Mich. 454, 5 N. W. 654.)

A case very much in point is *McKernan v. Robinson*, 84 N. Y. 105. It was provided by the revised statutes of New York that, after a bill filed to foreclose a mortgage, no proceeding whatever should be had at law to recover the debt secured by the mortgage, unless authorized by the court. The court in that case held that the action, in the absence of such authority, could not be maintained, but the court did not hold that the leave to sue was a part of the cause of action. The court said that the statute was passed to prevent vexatious and oppressive litigation, and that application for leave to sue may be refused, within the reasonable discretion of the court, but the court said: "Where leave to sue in such a case is given, the cause of action is the contract or obligation of the party. The permission of the court simply removes an obstruction against the enforcement by suit. If the action has been commenced without previous authority, the fact may be pleaded, and the plea would be in the nature of a plea in abatement to the action. If the plaintiff is defeated upon this ground, he may afterwards apply to the court for leave to sue, and, if granted, he may commence a new action for the same cause. If the plaintiff has commenced his action without leave, there would seem to be no valid reason why the court, instead of putting the plaintiff

iff to the necessity of discontinuing, may not, in a proper case, manifest its consent to the prosecution of the action by a retroactive order, to take effect as of a time anterior to its commencement. The defendant is thereby deprived of no substantial defense."

We are of opinion that the New York case states the principle correctly, and that the permission of the court to sue, or, in the case at bar, the order made to bring the action, is simply a provision to keep certain actions within the control of the court, and that, therefore, the permission or the order is not a part of the cause of action.

We are therefore of opinion that the complaint set out a cause of action, and, having determined that the answer set up no defense, the judgment on the pleadings will be therefore affirmed.

Affirmed.

PEMBERTON, C. J., concurs. HUNT, J., disqualified.

CASES DETERMINED

IN THE

SUPREME COURT

AT THE

JUNE TERM, 1896.

PRESENT :

HON. WILLIAM Y. PEMBERTON, Chief Justice.

HON. WILLIAM H. DE WITT, { Associate Justices.

HON. WILLIAM H. HUNT, {

MERCHANTS' & MINERS' NATIONAL BANK, APPEL-
LANT, *v.* BARNES, RESPONDENT.

[Submitted May 20, 1896. Decided June 8, 1896.]

18	835
19	109
18	335
20	196
18	835
29	76
18	335
d33	112

EQUITABLE ASSIGNMENT OF CLAIM—*Order—Acceptance.*—Where one to whom money is to become due upon the performance of a contract gives a creditor an order on the debtor for the money, to be paid when due, this is an equitable assignment of property to be acquired in the future, creating in the creditor an interest in the fund which equity will enforce, though the debtor did not accept the order or assent to the transfer.

GARNISHMENT—*Payment of garnishee—Liability of officer.*—An officer, who, upon the instructions of a judgment creditor, garnishees a debt due to the judgment debtor and applies on the execution money received from the garnishee, who paid it over without objection, is not liable therefor in an action for money had and received to another creditor to whom the judgment debtor had given an order on the garnishee

for the money prior to the garnishment, though he is notified by the latter of his claim to the debt, both before and after receiving the money from the garnishee.

SAME—Transfer of claim—Knowledge of garnishee.—The admission by a garnishee of an indebtedness to a judgment debtor and payment of the money to the officer levying the writ, does not relieve him from liability to one to whom the judgment debtor had transferred his claim prior to the garnishment and with the knowledge of the garnishee.

Appeal from Third Judicial District, Deer Lodge County.

ACTION for money had and received. The cause was tried before BRANTLY, J. Affirmed.

Statement of the case by the justice delivering the opinion.

Action for money had and received. The plaintiff bank alleges that the defendant and respondent, Barnes, received from the Granite Mountain Mining Company the sum of \$226.18, to and for the use of the plaintiff bank. The case was tried to the court without a jury. The evidence showed the following facts :

About January 31, 1894, one A. Tyler made a contract for hauling wood with the Granite Mountain Mining Company, for which the company was to pay him (Tyler) on the completion of the contract. About March 15, 1894, the contract was completed. About the time the contract was executed, Tyler borrowed \$300 from the plaintiff bank. To secure the payment of this sum, Tyler gave the following order on the mining company :

“Philipsburg, Mont., Jan. 31, 1894. To James H. Henley, Superintendent Granite Mountain Mining Co., Granite, Montana.—Dear Sir : Please deliver to Merchants' & Miners' National Bank the check due me, March 15th, for hauling wood from Cleveland shaft to Bimetallic hoist. [Signed] A. Tyler.”

This order was immediately presented by the plaintiff bank to the mining company for acceptance, but it was not accepted at that time, as there was no money yet due to Tyler; but it was agreed that, if Tyler would indorse his check to be given him in payment of the contract for hauling wood by the mining company on completion of this contract, the mining com-

pany would deliver the indorsed check to the bank. Afterwards, about March 1st, the amount due to Tyler was garnished in the hands of the mining company, in a suit brought by Merrell & Co. in a justice's court of Granite county; and on March 17th the sum of \$226.18, the amount of money sued for by plaintiff in this action, was paid to the defendant, Barnes, the constable who served the papers on an execution from the justice's court in the aforesaid suit of Merrell & Co. against Tyler. Before the mining company paid the money to Barnes, the constable, the plaintiff bank demanded payment of the same, to-wit, from the mining company, and also notified Barnes of its claim to said money. A subsequent demand was likewise made by plaintiff bank for the money, upon Barnes, after its receipt by him from the mining company. The money was applied by Barnes, the said constable, in satisfaction of of the judgment against Tyler in favor of Merrell & Co.

At the conclusion of plaintiff's testimony the defendant moved for a non-suit, but the court concluded to hear the evidence of the defense, and reserved its decision on the motion. Subsequently judgment was rendered for the defendant upon the questions of law involved. A motion for a new trial was made and overruled. The plaintiff appeals from the judgment and the order overruling the motion for a new trial.

H. R. Whitehill, for Appellant.

Durfee & Brown, for Respondent.

HUNT, J.—An action of assumpsit, for money had and received, is a remedy equitable in its nature, existing in favor of one person against another, when that other person has received money, either from plaintiff or a third person, under such circumstances that, in equity and good conscience, he ought not to retain the same, and which *ex æquo et bono*, belongs to plaintiff. (*Buel v. Boughton*, 2 Denio 91; *McFadden v. Wilson*, 96 Ind. 253; *Lockwood v. Kelsea*, 41 N. H. 185; *Laport v. Bacon*, 48 Vt. 176.)

The old doctrine of the common law, that no action of contract can be maintained unless there is privity of contract between plaintiff and defendant, no longer generally prevails. Thus under the common law, as illustrated by the facts of this case, the mining company being indebted to Tyler, and Tyler having given an order to the bank for moneys due on such debt to this plaintiff bank, the bank could maintain no common law action against the mining company to recover the amount, unless the mining company had assented to the appropriation, and promised, either expressly or by implication, to pay the money; and in such case the action would not be based upon any property or interest in the fund acquired by the bank through the order, but upon the mining company's promise to pay.

But the equitable rule is different. By it an interest in the fund is recognized, and this interest arises through the order, which operates as an assignment, and generally permits such interest to be enforced by suit, even where the debtor upon whom the order has been drawn has not assented to the transfer. In this case, therefore, if the mining company, as a debtor of Tyler, held money which it was bound to pay to Tyler, and if Tyler agreed with the plaintiff bank that the money should be paid to the bank, and gave to the bank an order upon the mining company for the money, this order creates an equitable interest or property in the fund, in favor of the assignee, the plaintiff bank; and it was not necessary that the mining company should consent or promise to hold the money for, or pay it to, the plaintiff bank. This doctrine is applied in cases where the debt actually exists, or where it exists *in futuro*. As stated by Pomeroy (Pom. Eq. Jur., § 1283): "The equitable doctrine with respect to the assignment of property to be acquired in future is extended to this species of equitable transfer. The fund need not be actually in being; if it exists potentially,—that is, if it will, in due course of things, arise from a contract or arrangement already made or entered into when the order is given,—the order will operate as an equitable assignment of such fund as soon as it

is acquired, and will create an interest in it which a court of equity will enforce." (*Brill v. Tuttle*, 81 N. Y. 454; *McFadden v. Wilson*, 96 Ind. 253; *Macomber v. Doane*, 2 Allen 541; *Tripp v. Brownell*, 12 Cush. 376.) The order given, therefore, by Tyler to the plaintiff bank upon the mining company was a valid assignment of property to be acquired in the future, and created in the bank an interest in the fund to be acquired, which equity may enforce.

Nor do we doubt the general doctrine contended for by appellant, that a plaintiff may waive an action in tort, and sue in *assumpsit*, where the property has been wrongfully taken, and converted into money. "If a man," says Addison on Torts, "has taken possession of property, and sold or disposed of it, without lawful authority, the owner may either disaffirm his act, and treat him as a wrongdoer, and sue him for a trespass or for a conversion of property, or he may affirm his acts, and treat him as his agent, and claim the benefit of his action, and if he has once affirmed his acts, and treated him as his agent, he cannot afterwards treat him as a wrongdoer; nor can he affirm his acts in part, and avoid them as to the rest. If, therefore, goods have been sold by a wrongdoer, and the owner thinks fit to receive a price therefor, he ratifies and adopts the transaction, and cannot afterwards treat it as a wrong."

But it is unnecessary to enter into any discussion of this doctrine in this particular action, because, under the facts, we do not think that the remedy pursued by the plaintiff is correct. If the case were one where specific property in the hands of the mining company had been levied upon by the constable under his writ, and he had levied with notice of the assignment by Tyler to the plaintiff bank, and had sold the specific property claimed by the bank, doubtless the action would lie, and the case of *Young v. Marshall*, 8 Bing. 43, would control, upon the principle that the sheriff having sold particular goods under a writ of *fi. fa.*, with notice of a previous assignment by the defendant, and having paid over the proceeds of the sale to the plaintiff, an action for money had and received

might be maintained to recover the proceeds of the sale of the specific property. In that case it was urged that the property was changed by the sale, but it was held by Alderson, J., that while the property was changed by the sale, as between a purchaser and the party against whom the execution has issued, yet it was not changed as against a party whose goods had been wrongfully taken. The same rule is sustained in *Notley v. Buck*, 8 Barn. & Cr. 86. But the case at bar is different. Here Merrell & Co. placed a writ in the hands of the defendant, as constable, commanding him to attach the debts due to Tyler by the Granite Mountain Mining Company. Acting strictly in pursuance of the authority of this writ, the constable served the necessary notices upon the mining company, telling them that all funds in their hands, due to Tyler, were attached to satisfy the claim of Merrell & Co. The mining company, although it knew of the assignment or order of Tyler, responded by confessing that it had money in its hands belonging to Tyler. The officer was not obliged, under such circumstances, to disregard the acknowledgment of the company, and to desist from further proceedings under his writ. When the execution was levied the company, although notified of the bank's claim, without objection or protest of any kind on its part, paid the officer the amount of the claim of Merrell & Co. It thus again admitted an indebtedness to Tyler. These acknowledgments and acts were sufficient to protect the officer from liability in this suit. Under such circumstances the answer of the garnishee was properly taken as true by the officer, and in the absence of any mistake, fraud, collusion or deception, the constable who proceeded under his writ of execution was not obliged to decline the money which the mining company confessed it owed to Tyler, even though he was notified by the bank of the assignment by Tyler to the plaintiff. (*Haase v. Corbin*, 2 Mont. 409; *Kelley v. Tibbals*, 53 Pa. St. 408; *Coombs v. Davis*, 2 Wash. T. 466, 7 Pac. 860; Shinn on Attachments, § 640; Drake on Attachment, § 651 *et seq.*) Of course, this confession of the mining company and payment to the constable in no way discharged its debt to the plaintiff bank

in this case, under the order executed in favor of the bank by Tyler. (*Chamberlin v. Gilman*, 10 Col. 94, 14 Pac. 107; *Coleman v. Scott*, 27 Neb. 77, 42 N. W. 896; *Freeman on Ex'n.*, § 170.) But, after the money collected under the execution has been paid to the creditors of Tyler, we cannot see how the conduct of the officer renders him liable to the bank, in equity and good conscience, for the payment of the sum so collected. He proceeded under the strict command of his writ, and knowledge obtained in legal manner.

St. Johns v. Charles, 105 Mass. 262, in some respects resembles this case. There St. Johns made a contract with Charles to cut brush for \$100 in money and the loose wood on the lot. Afterwards St. Johns had begun the job, but, before it was accepted by Charles, St. Johns, for a consideration, signed and gave to Taft an order on Charles for all the money belonging to him for cutting the brush. Charles had notice of the order, and the contract was performed. Thereafter Charles was requested to pay the order to Taft, but neglected to do so. After suit was brought by St. Johns, Charles, without giving Taft any notice of it, paid St. Johns \$25 in money, and took his receipt in full for the contract. On the trial Charles contended that he was discharged by reason of the receipt in settlement, and that the same was a complete defense, notwithstanding the order of St. Johns. But the court held that the settlement made between St. Johns and Charles was no bar or defense to the right of Taft to prosecute suit for his own benefit, that the effect of the order was to assign to Taft all the money that should be earned under the existing contract, and that the rights of Taft under the assignment after notice could not be defeated by a payment and discharge from the assignor.

It seems clear that the plaintiff's action lies against the mining company, but, after full consideration, we think that it would not be safe to hold an officer liable who proceeds, under proper mandate, to satisfy a judgment by accepting money acknowledged, as in this case, to be due from a garnishee to the defendant in the suit wherein the execution has issued, and

where the money is paid, in accordance with such acknowledgment, and without objection, to the official.

The judgment and the order denying a new trial are affirmed.

Affirmed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

YORE, RESPONDENT, v. MURPHY, APPELLANT.

[Submitted June 4, 1896. Decided June 8, 1896.]

STATUTE OF LIMITATIONS—Conversion.—In an action by a wife for the conversion of personal property belonging to her and sold by her husband to the defendant, without her knowledge, the statute of limitations begins to run against the plaintiff's right of action at the time of the sale and not at the time when she first had knowledge of the sale.

Appeal from Eighth Judicial District, Cascade County.

ACTION for conversion. The cause was tried before BENTON, J. Plaintiff had judgment below. Reversed.

Statement of the case by the justice delivering the opinion.

This is an action for damages for the alleged conversion of personal property. The plaintiff claims, in her complaint, to have been the owner of a band of sheep, known as the "Yore Band," consisting of 1 250 wethers and 1,650 ewes and lambs, and the wool of said sheep, alleged to be of the value of \$2,000. The complaint alleges that on the 20th day of June, 1890, the defendant, in Cascade County, Montana, wrongfully took and converted said sheep and wool to his own use, to the damage to plaintiff in the sum of \$12,750.

The defendant, in his answer, denies that the plaintiff is the owner of any of such property, as well as all other material allegations of the complaint. The defendant, further answering, alleges that on or about August, 1887, he became the

owner and possessed of said sheep by virtue of a purchase thereof from one James A. Yore, and alleges that, ever since that time, he has been in open, notorious, and adverse possession of said property, and all of it, as the owner thereof; and the defendant alleges that the cause of action set out in plaintiff's complaint is barred by the provisions of subdivision 3, § 42, of the Code of Civil Procedure (Compiled Statutes 1887). The allegations of the answer are denied by the replication of the plaintiff. The case was tried to a jury, and a verdict returned in favor of plaintiff for the sum of \$5,000, upon which judgment was rendered in favor of plaintiff. From this judgment, and order refusing a new trial, the defendant appeals.

William T. Pigott, for Appellant.

Where the possession of property is obtained from one who has no right to transfer it, the right of action by the owner against the transferee accrues as soon as the transferee acquires possession. The want of knowledge by the owner of the taking in no wise affects the rule. The period within which the action must be brought commences when the right of action accrues. (*Wells v. Ragland*, 1 Swan. (Tenn.) 501; *Mast v. Easton*, 33 Minn. 161; *Stanley v. Gaylord*, 1 Cush. 536; *Thrall v. Lathrop*, 30 Vt. 307; *Trudo v. Anderson*, 10 Mich. 357; *Whitney Co. v. McConnell*, 29 Mich. 12; *Harpending v. Meyer*, 55 Cal. 560; *Whitman v. Tritle*, 4 Nev. 495; *Fee v. Fee*, 10 Ohio, 469; s. c. 36 Am. Dec. 103; *Chapin v. Freeland*, 142 Mass. 383; s. c. 56 Am. Reps. 701; *Galvin v. Bacon*, 2 Fairf. (Me.) 28; *Riley v. Boston Co.*, 11 Cush. 11; *Hyde v. Noble*, 13 N. H. 494; *West v. Trenton*, 3 Vroom. N. J. 517; *Morris v. Moulton*, 40 Vt. 242.) The statute begins to run from the time of the unlawful taking and not from the discovery by plaintiff of that act. (*West v. Trenton* and *Morris v. Moulton* and cases heretofore cited.) It is the settled law, that the statute is a bar to an action for conversion, commenced more than two years after the conversion, although plaintiff did not know of the conversion until within

that period. (*Welton v. Co.* (Neb.) 20 N. W. Rep. 111; *Cook v. Clippard*, 12 Mo. 379; *McCombe v. Davies*, 6 East. 540 (cited in Wood on Limitation, p. 382, note); *Dee v. Hyland*, 3 Pac. Rep. 388; *Granger v. George*, 5 B. & C. 149; *Townsend v. Eichelberger*, 38 N. E. Rep. 207; *Commissioners v. Lode*, 36 N. E. Rep. 772; *Johnson v. White*, 13 S. & M. 584; *Smith v. Newby*, 13 Miss. 159; *Clark v. Marriott*, 9 Gill. 331; *Jordan v. Thornton*, 7 Ga. 517; *Ward v. Dulaney*, 23 Miss. 410; *Clark v. Reeder*, 18 Speers (S. C.) 398.)

Massena Bullard, and *Ransom Cooper*, also for Appellant.

Walsh & Newman and *Leslie & Downing*, for Respondent.

The plaintiff had no knowledge that the defendant claimed to be the owner of the sheep or that the Park boys were acting as his agents until 1890. His claim of possession of the sheep was not sufficient to set the statute of limitations to running against the plaintiff. The courts and text writers hold that to obtain title to property by adverse possession the possession of the party claiming title must be open, notorious and adverse and the owner must have knowledge of the possession and the adverse claim. (Buswell on Limitations, § 222-224; *Lucas v. Daniels*, 34 Ala. 188; *Baker v. Chase*, 55 N. H. 61; *Lawson v. Cunningham*, 21 Ga. 454; *Eureka Company v. Norman*, 16 S. 579; *Millett v. Lagomarsino*, 38 Pac. 308; *Pond v. Cheaves*, 16 S. 145; *Neilson v. Gregnon*, 55 N. W. 890; *Graydon v. Hard*, 55 Fed. 724; *Trufant v. Hudson*, 13 S. 83.)

PEMBERTON, C. J.—The first question presented is as to whether the plaintiff's cause of action, if she ever had a cause of action, is barred by the statute of limitations.

Under subdivision 3, § 42, of the Code of Civil Procedure (Compiled Statutes 1887), actions of this character are barred unless commenced within two years from the date of the conversion.

John A. Yore, mentioned in the statement, was the husband of the plaintiff; and it is conclusively shown that he sold the

sheep in controversy to the defendant in the month of August, 1887, and that the defendant had possession of the sheep from that time until the commencement of this suit, in June or July, 1890, that the defendant had open possession thereof, claiming to be the owner, all this time, is amply shown.

It is not disputed, either by the evidence or argument of counsel, that the defendant did purchase the sheep of John A. Yore, as above shown, and had possession as owner thereof during the time stated. But counsel for respondent contends that the sheep belonged to plaintiff in her own right; that her husband, who (they say) was her agent, had no authority to sell the sheep to defendant and that she had no knowledge that he had sold them to the defendant until about the time she commenced this action. Counsel for respondent, therefore, contend that the statute of limitations did not commence to run against plaintiff's right of action until she had knowledge of the sale by her husband and the conversion of the sheep by the defendant.

As a general rule the statute of limitations begins to run from the time when the right of action accrues. (1 Wood Lim. p. 311, § 117.) The same author (page 447, § 177) says: "In the case of torts arising *quasi ex contractu*, the statute usually commences to run from the date of the tort, not from the occurrence of actual damage. And ignorance of the facts on the part of the plaintiff will make no exception to the rule, although he discovers his injury too late to have a remedy. This will be the case, too, even where the defendant has betrayed the plaintiff into permitting the time to elapse in fruitless inquiries and negotiations."

In *Lattin v. Gillette*, 95 Cal. 317, 30 Pac. 545, the court says: "The statute of limitations begins to run against a cause of action as soon as the right of action has accrued. Upon the breach of any special contract, the statute begins to run at the date of the breach, and a right of action growing out of the negligence of another accrues whenever the act of negligence is complete. 'When misconduct or negligence constitutes a cause of action, the statute of limitations begins to

run from the time when the defendant has been guilty of such misconduct or negligence.' (*Wood v. Currey*, 57 Cal. 209.) Whether the negligence out of which the cause of action arises is the breach of an implied contract, or the affirmative disregard of some positive duty, is immaterial. In either case, the liability arises immediately upon such breach of contract or disregard of duty, and an action to recover the damages which are the measure of such liability may be immediately maintained. The right to maintain the action is distinguished from the measure of damages, and, although the entire damage resulting from such negligence may not have been sustained, or the fact that the negligence occurred may not have been known until the right to a recovery is barred, yet the time within which an action may be brought is not thereby prolonged."

In *Harpending v. Meyer*, 55 Cal. 555, it was held: "Where the possession of property is obtained, in good faith or otherwise, from one who had no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession, and no demand or further act of conversion is necessary. Accordingly, in an action against defendants, who had, in good faith and without notice of the plaintiff's rights, received in pledge the plaintiff's goods from her bailee, and afterwards sold them, *held*, that the statute of limitations commenced to run from the time of the defendants' acquiring possession, and not from the time of the subsequent sale of them."

In *Fee v. Fee*, 10 Ohio 470, it was held that "a fraudulent concealment by which plaintiff has been delayed will not enlarge the time of bringing an action under the statute of limitations."

In section 27, Busw. Lim., it is said: "It is a rule of the civil law that prescription begins to run from the time when the creditor acquires a full and perfect right to prosecute his demand. * * * Although the application of the rule is often attended with difficulty, and must vary with the facts and circumstances of each particular case, it may be said, in general, that it is a rule in equity, as well as in law, that the

cause of action or suit arises when and as soon as the party has a right to apply to the proper tribunal for relief." (*Brashin v. Tolleth* (Neb.) 48 N. W. 398; *Strickler v. Railway Co.*, 125 Ind. 412, 25 N. E. 455; *Tillison v. Ewing* (Ala.) 8 South. 404.)

Some authorities are to be found that hold that the statute of limitations does not begin to run, in cases like this, until the plaintiff could have known, by the exercise of proper vigilance, inquiry and effort, of the conversion of the property. But the facts of this case do not bring it within this rule, if it be conceded to be the correct rule of law.

Plaintiff says, in substance, that for years her husband had charge and the entire management of the sheep, and that she gave herself no concern about them. For more than two years she and her husband were out of the state, living in St. Louis. During this time defendant had possession, as owner, of the sheep. Plaintiff says that, during this time, she never made any inquiry about the sheep, or made the least effort to ascertain who had the possession and care of them. There is no reason apparent from the record why she could not have known all about the sheep, and defendant's possession and claim of ownership thereof, at any time during the years she claims to have been the owner of the property. For over two years neither she nor her husband had anything to do with the sheep. The defendant had the possession. It is rather remarkable that, during the last two or three years of John A. Yore's life, neither he nor plaintiff ever questioned the title, ownership or possession of defendant to the sheep; but, the very moment Yore dies, plaintiff asserts her title, and proclaims her ignorance of the purchase or alleged conversion of the sheep by defendant.

There are many errors assigned in this case, too many of which, we think, are well sustained; but, as we are clearly of the opinion that the action is barred by the statute of limitations, it becomes unnecessary to treat any other question raised by the record. If it be objected that we are too strictly enforcing the rule as to when the statute of limitations begins

to run, we have no cause to regret the strictness of its enforcement in this case. A careful consideration of the whole record, and especially of her own evidence, in this case, convinces us that plaintiff's cause is without merit, and that she ought not to recover in any event.

As these views dispose of the case, the judgment and order appealed from are reversed, and the case remanded, with instructions to grant a new trial, and proceed in conformity with the views expressed in this opinion.

Reversed.

HUNT, J., concurs. DE WITT, J., not sitting.

MURPHY ET AL., v. CANNON ET AL., HAYES, INTERVENOR, APPELLANT.

[Submitted June 4, 1896. Decided June 8, 1896.]

INTERVENTION—Dismissal of complaint—Foreclosure.—A complaint in intervention, filed in an action to foreclose a mortgage upon city lots, in which the intervenor alleged title to certain of the lots included in the mortgage which had been conveyed to him by the mortgagor prior to the mortgage, is properly dismissed, where, after the filing of the complaint in intervention the plaintiffs amended their complaint so as to exclude the lots in controversy, since the intervenor had then no further interest in the matter in litigation.

SAME—Same—Parties.—It is no objection to the dismissal of the complaint in intervention in such case that the intervenor was entitled to a judgment requiring the mortgagor to file with the county clerk and recorder a plat of a proposed addition to the city including his lots as demanded in the complaint, where the city and county would be interested in the filing of such a plat and were not parties to the action.

Appeal from First Judicial District, Lewis and Clarke County.

FORECLOSURE of mortgage. The intervenor's complaint was dismissed by BLAKE, J. Affirmed.

E. C. Russell, for Appellant.

DE WITT, J.—The plaintiffs brought this action against the defendants to foreclose a mortgage. W. H. Hayes, by leave

of the court, filed a complaint of intervention. He set up that he was the owner of certain lots which were included in the mortgage, and that said lots were deeded to him by the mortgagor, Cannon, prior to the mortgage, and that the lots were described in the deed as in an official plat to be filed, and that the plat had not been filed in the office of the county recorder. The relief which he demanded was that the mortgagees take nothing as to said property of the intervenor, and that the mortgagor be required to file in the office of the county clerk and recorder a plat of a certain proposed addition to the city of Helena, which included the land of the intervenor. Thereupon the plaintiffs amended their complaint, and excluded from their demand of foreclosure the land of the intervenor. The court then dismissed the complaint in intervention. The intervenor appeals.

In order to allow a complaint in intervention, it must appear that the person proposing to intervene has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. (Code of Civil Procedure, 1887, § 24.) When the land of the intervenor was by amendment of the complaint excluded from the demand for foreclosure, the intervenor had no further interest in the litigation. But he now contends that he is entitled to a judgment requiring the mortgagor to file a plat of the addition to the city of Helena, including his lots. But that has nothing to do with the cause of action. The cause of action was simply to foreclose the mortgage. And, furthermore, the city of Helena and the county of Lewis and Clarke are interested in the filing of such plats, as the same must be approved by the city and county authorities. (§§ 2033, 2034, Compiled Statutes, Fifth Division; 16th Session Laws, 1889, page 228.) But the city or the county is not a party to this litigation. The appellant says, however, if the mortgagor cannot file an official plat in the office of the county recorder, he can at least file a plat or map of the proposed addition. But if such plat or map is not filed officially, and under the requirements of the law, it is not a record, and would be useless for any purpose. (*Moxon v.*

Wilkinson, 2 Mont. 421; *Flick v. Mining Co.*, 8 Mont. 304; *Ditch Co. v. Henry*, 15 Mont. 576.)

It does not appear that the intervenor has any interest in this litigation. (Code of Civil Procedure, 1887, § 24.) He was dismissed without prejudice, and if he has any cause of action against the mortgagor for reformation or correction of his deed that remedy is left to him in another action.

The judgment of the district court entered pursuant to the dismissal of the intervenor's complaint is affirmed.

Affirmed.

PEMBERTON, C. J., concurs. HUNT, J., being disqualified in this case, does not participate in this decision.

EDGERTON, RESPONDENT, v. POWER ET AL., APPELLANTS.

[Submitted May 26, 1896. Decided June 8, 1896.]

PLEADING—Denial—Negative pregnant.—The denial in an answer that "the amount of stock" sold by plaintiff to defendants was ever delivered, being pregnant with the admission that all of the stock had been delivered except a fractional portion, is insufficient to support proof of nondelivery.

CONTRACT—Consideration—Promissory note and contemporaneous agreement.—The premises recited in a contract were that the plaintiff owned certain stock in a railroad; that it had been agreed that defendant should purchase of plaintiff one-half of his stock at a stated price and that it was desired that the parties should vote their stock as a unit and act in harmony in the management of the railroad. The contractual portion of the instrument recited that in consideration of the premises the parties agreed, first, that the plaintiff should sell and deliver to the defendants one-half of his stock at a certain price for which the defendants should give their note payable six months after date. The balance of the contract was covered by ten other paragraphs containing agreements for pooling and voting the stock, which arrangement was to continue for ten years, though no time was fixed for forming the pool. Held, in an action on the note, that the only consideration for the note was the delivery of the stock as provided in the first paragraph, which was complete in itself and independent of the others, and that the nonperformance of the further agreements was not a defense.

Appeal from First Judicial District, Lewis and Clarke County.

ACTION on promissory note. Judgment was rendered for the plaintiff below by Buck, J. Affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiff sued the defendants upon a promissory note for \$8,000 made by defendants to plaintiff. The answer admits the making and delivery of the note, and seeks to defend by setting up that the note was made in connection with a written contract between plaintiff and defendants dated December 30, 1889, which contract is pleaded in full. The answer alleges that the terms of said contract were the consideration for the note, and that among them it was agreed that the plaintiff was to sell to defendants 277½ shares of the stock of the Helena, Hot Springs & Smelter Railroad Company, and that plaintiff has never sold or delivered to defendants the amount of the stock agreed to be sold, and that he was not at the time of making the contract, or at any time since, able to comply with its conditions as to the sale of said stock. It is further alleged that part of the terms of said contract were that said railroad should be extended over certain real estate owned by the defendants, and that the railroad was never so extended; that another condition of said contract was that a stock dividend should be declared among the stockholders of the stock then in the treasury, but that said dividend was never declared. The agreement referred to was between Power and Sullivan (these defendants), parties of the first part, E. D. Edgerton (plaintiff), party of the second part, and Sanford and Evans, parties of the third part. It was executed by only Power and Sullivan and Edgerton. The recitals and first paragraph of the contract are as follows:

“Whereas, the said party of the second part is the owner of five hundred and fifty-five and one-half shares of the full-paid and unassessable capital stock of the Helena, Hot Springs and Smelter Railroad Company, a corporation duly incorporated under the laws of Montana; and whereas, the said parties of the third part are the owners of 112½ shares of said capital stock; and whereas, it has been agreed that the said parties of the first part shall purchase of the said party of the second part one-half of the said shares of stock so owned by the said party of the second part at and for the price of eight thousand dollars (\$8,000); and whereas, it is desired by all

the parties hereto that the stock now owned by the parties of the second and third parts and the stock so to be purchased by the said parties of the first part shall be voted as a unit; and whereas, it is desired that all of said parties shall act together and in harmony, with reference to the management of the affairs and conduct of the business of said Helena, Hot Springs and Smelter Railroad Company :

“Now, therefore, in consideration of the premises, and of the sum of one dollar to each in hand paid, it is agreed by and between the said parties: First: That said party of the second part agrees to sell to the said parties of the first part, and said parties of the first part agree to purchase of the said party of the second part, one-half of said five hundred and fifty-five shares of the capital stock, at and for the price or sum of eight thousand dollars, for which sum said parties of the first part shall give their note payable to the order of the said party of the second part six months after the date hereof, with interest thereon at the rate of eight per cent. per annum from date until paid.”

Then follow 10 other sections of the contract. The matters contained in these sections are agreements for pooling the stock of the railroad, and voting the same as a unit, extending the railroad to certain lands, and the doing of certain other acts, which need not be further described in detail.

A replication was filed to this answer. Upon the trial the defendants, having admitted the making and delivering of the note, naturally assumed the burden of proof. Defendant Power was called as a witness, and partially examined, whereupon the plaintiff objected to any testimony being introduced by the defendants under the pleadings. The court sustained this motion, except as to the delivery of certain shares of the stock of the railroad company. The court held that the delivery of the stock was the only issue raised by the pleadings. Defendants' counsel asked leave to file a second amended answer. This was denied by the court. The proffered answer appears in the record.

The ruling of the court that the only issue, under the plead-

ings, was the delivery of the stock, was made upon the offer by the defendants to prove that the agreements set out in the contract of December 30th, as to pooling the stock, extending the road, and making a stock dividend, etc., which matters were part of the contract, were in fact intended to be a part of the consideration for the note, and that such consideration had failed. These matters were partially set out in the first amended answer, upon which the trial was being had, and were set out in a much more amplified form in the second amended answer, which the court would not allow to be filed. It was upon the offer to prove all these matters, and especially the allegations of the second amended answer, that this ruling of the court was made. The defendants allege error in the refusal to allow this proof, and the refusal to allow to be filed the second amended answer. The examination of the witness Power then continued until, it seems, attention was attracted to what the court considered the insufficient denial in the answer.

The answer simply denied that "the amount of stock" sold by plaintiff to defendants was ever delivered. The court suggested that this denial was pregnant with the admission that all of the said stock had been delivered, except an immaterially fractional portion, and that, therefore, there was in fact, no substantial denial. The court offered to allow the defendants to amend their answer so that they might deny that any of the stock was ever delivered, or that they might state what amount, if any, was delivered, and what amount was not. Defendants' counsel declined to make such amendment.

The second amended answer, which the defendants had tendered, it was contended, did contain a proper denial of the delivery of the stock; but this second amended answer also contained all of the allegations as to other matters in the contract forming a part of the consideration for the note, and these matters were considered by the court as forming no defense. So the issue between the court and counsel was this: The court was willing that counsel should amend so as to deny the delivery of the stock, or a portion of it, which the court

was of opinion was a material issue, but would not allow the counsel to add to this denial all of those other allegations which the court deemed to be immaterial. Counsel stood upon their position, and refused to amend at all, if they were not allowed to amend as they contended they had a right to do.

The defendant Power had given testimony tending to show that the stock, or a material portion thereof, had not been delivered to him and Sullivan. The court, being of opinion that the answer contained no denial to support this proof, struck out the whole of Mr. Power's testimony, as not being supported by an allegation in the answer. This left the case without any defense, and the court, as a logical sequence, instructed the jury to find for the plaintiff. This was done, and judgment entered accordingly. The defendants appeal from the judgment, and from an order denying a new trial.

Toole & Wallace, F. N. & S. II. McIntire and H. G. McIntire, for Appellants.

The performance of all the agreements mentioned in the contract was a condition precedent to the right to demand and enforce payment of the note. As the agreements were not performed there was no right of action on the note. (*Plate v. Vega*, 31 Cal. 384; *Billings v. Everett*, 52 Cal. 661, and cases cited in brief; *Withers v. Greene*, 9 How. (U. S.) 213; *Bank v. Leonhart*, 25 N. E. Rep. 1099; *Knight v. Knight*, 28 Ga. 165; *Boynnton v. Twitly*, 53 Ga. 214; *Stacy v. Kemp*, 97 Mass. 166; *McLaughlin v. Clausen*, 24 Pac. Rep. 636; 2 *Estee's Pl.* pp. 532-533; *Bookstaver v. Jayne*, 60 N. Y. 146; *Benton v. Martin*, 52 N. Y. 570-574; *Harrington v. Stratton*, 22 Pick. 510; *French v. Gordon*, 10 Kan. 370; *Pitts v. Allen*, 72 Ga. 69; *Hall v. Henderson*, 84 Ill. 611; *Bookstaver v. Jayne*, 60 N. Y. 150.) The note and contract of December 30, 1889, being an entire transaction, the reason for the existence of the note and the defendants' liability thereon being contained and explained in the memorandum of agreement, it was error to rule out the defense set up in the amended an-

swer. There was no attempt on the part of the defendants to vary the terms of the note, but merely to show under what circumstances, according to the expressed and manifest intention of the parties, a liability upon the note should accrue. But, assuming for the sake of argument, that the defendants by their pleading and the lines of evidence offered, sought to vary by parol the terms of a written instrument, such pleading and proof were clearly within the exceptions to the rule prohibiting such variance. (Compiled Statutes, First Division, §§ 628, 632; Abbott's Trial Evidence, page 294; 1 Greenleaf on Evidence, §§ 275, 284, note, 285; *Bohn Manufacturing Co. v. Harrison*, 13 Mont. 293; Story on Contracts, §§ 480, 481; 2 Parsons on Contracts, §§ 582, 583; 2 Mont. 563.)

T. H. Carter and McConnell, Clayberg & Gunn, for Respondent.

I. The allegation that the note was delivered in connection with a certain contract in writing, is of itself sufficient to show that the execution and delivery of the note and the signing and entering into the contract were a part of the same transaction. The rule is well established that where a contract is delivered in connection with a promissory note, the note and contract are to be construed together. (*Hubbard v. Marshall*, 50 Wis. 322, 327; *Langan v. Langan*, 89 Cal. 186; *Zimpelman v. Hipwell*, 54 Fed. 848; § 2207, Civil Code of Montana.) Parol evidence was not admissible to show any other consideration for this note except the sale of this stock because of the provisions and recitals of said contract. (*Hubbard v. Marshall*, 50 Wis. 327; *Langan v. Langan*, 89 Cal. 186; *Zimpelman v. Hipwell*, 54 Fed. 848.) See, also, in support of the proposition that parol evidence is not admissible to vary, qualify, contradict, add to, or subtract from the absolute terms of a written instrument. (*Brown v. Spofford*, 95 U. S. 474; *Specht v. Howard*, 16 Wall 564; *Bank v. Dunn*, 6 Pet. 51; *Forsythe v. Kimball*, 91 U. S. 291; *Brown v. Wiley*, 20 How. 442; Greenleaf on Evidence, §§ 275, 276 and 277;

Styles v. Vandewater, 4 At. 658; *Fisher v. Briscoe*, 10 Mont. 124; Compiled Statutes, First Division, § 628.)

II. Appellant's contention that the performance of the said contract was a condition precedent to the right to demand and enforce payment of this note, is based upon the false position that evidence was admissible to show that the consideration for said note was different from that stated in the contract. For the reason that parol evidence was not admissible to vary the terms of the contract, it was incompetent to show that this note, which contains an absolute promise to pay, was payable upon condition. (Randolph on Commercial Paper, Vol. 1, § 94, and cases cited in note; *Brown v. Spofford*, 95 U. S. 474; *Allen v. Furbish*, 4 Gray 504; *Underwood v. Simonds*, 12 Met. 275; *Union Stock Yards v. Western Land Company*, 59 Fed. 49.)

III. The only defense was a failure of consideration. This defense is inconsistent with the claim that the note did not become operative. The evidence offered was "That the payment of the note was conditioned upon the fulfillment by the plaintiff of this promise and the other promises mentioned, and that none of them were fulfilled." The effect of this evidence was not to show that the note never became operative but to attach a condition to the payment of the note, which was not permissible under the circumstances. (*C. & V. R. R. Co. v. Parker*, 84 Ill. 613; *DeLong v. Lee*, 34 N. W. 613; *Brown v. Wiley*, 20 How. 443, and cases cited *supra*.)

IV. That this is a severable contract, see the following authorities: 2 Parsons on Contracts, 6th Ed., page 517; *Pitkin v. Frink*, 8 Met. 12; *Waterhouse v. Kendall*, 11 Cush. 128; *Traver v. Stevens*, 11 Cush. 167; *Hodgkins v. Moulton*, 100 Mass. 309; *McGrath v. Cannon*, 57 N. W. 150 and cases cited.

V. There was no error in striking out the evidence as to the delivery of this stock. The answer merely alleges that the amount of stock was not delivered. This was an allegation of a negative pregnant and presented no issue. (Bliss on Code Pleadings, § 332; *Power v. Gum*, 6 Mont. 5.) The gen-

eral allegation that no consideration was received for said note does not cure the defective allegation that the defendants did not receive the amount of stock. (*Parker v. Jewett*, 55 N. W. 56.)

DE WITT, J.—We are satisfied that the denial in the answer that “the amount of stock” had been delivered was a negative pregnant, for the reason set forth by the district court, and quoted in the statement preceding this opinion. The court was therefore justified under such a denial, in refusing to allow testimony as to the nondelivery of the stock. The court offered to allow counsel to amend this denial so that it would be well pleaded. Counsel refused to do so unless they were also allowed to allege in their proffered second amended answer that certain matters mentioned in the statement above, other than the delivery of the stock, were also part of the consideration for the note. The court held that this was an attempt to vary the terms of a written instrument, viz, the contract of December 30th. This matter is the gist of the whole case. The note was given December 30th, 1889, and it was given in connection with the contract of the same date. Appellants contend that it is not varying the terms of a written instrument, to wit, the promissory note, to show, *alunde* the note, what the real consideration was. Their counsel cites many authorities upon this point. This may be conceded. Then he proceeds to show the real consideration by pleading the contract of December 30th. This contract is admitted by the respondent. Then the next question is, what is the real consideration for the note, as shown by the written contract? If the real consideration be shown by the contract of December 30th, then we have that contract as a written instrument in which to find the consideration. (*Pitts v. Allen*, 72 Ga. 69.)

We must therefore look to the contract of December 30th to ascertain the real consideration. Was that consideration the delivery of the stock, or was it the delivery of the stock and the performance of all the other terms of that contract?

The district court said it was the delivery of the stock only. This point was raised in several ways during the trial, and is the gist of this controversy. We must therefore proceed to construe the contract.

The contract says, "In consideration of the premises and the sum of one dollar to each in hand paid, it is agreed," etc. Appellants make the point that all the agreements of the contract are in consideration of the premises. The premises are set forth in the recitals preceding the contractual portion of the instrument. Referring to the contract as set out in the statement of the facts preceding this opinion, it is observed that the recitals consist of statements of some facts, and of some desires of the parties. The facts recited are that Edgerton is the owner of 555½ shares of the railroad stock, and Sanford and Evans of 112½ shares, and that it had been agreed that Power and Sullivan shall purchase of Edgerton one-half of his said shares, at the price of \$8,000. After stating these facts, the recitals then set forth that it is desired by all parties that the stock owned by Edgerton and Sanford and Evans, and the stock purchased by Power and Sullivan, shall be voted as a unit, and that all of the parties shall act together and in harmony in the management of the railroad, etc. These facts and these desires of the parties being recited as premises, the contract goes on to state that in consideration of the premises the parties agree to certain things. What they agree to is set forth in a series of eleven paragraphs, numbered consecutively from first to eleventh. The first is as follows:

"That said party of the second part agrees to sell to the said parties of the first part, and said parties of the first part agree to purchase of the said party of the second part, one-half of said five hundred and fifty-five and one-half shares of capital stock at and for the price or sum of eight thousand dollars, for which sum said parties of the first part shall give their note, payable to the order of the said party of the second part six months after the date hereof, with interest thereon at the rate of eight per cent. per annum from date until paid."

Then the contract goes on and sets forth the ten other paragraphs, containing the other agreements which the parties made. Paragraph 1. certainly very plainly sets forth in writing that the consideration of the note is the delivery of the one-half of the 555½ shares of the stock of the railroad company. It has already been recited that such agreement had been made. The fact that it had been made is one of the premises of the contract, as above noted. The other premises were the desire of the parties to operate the railroad in harmony, etc. If the premises, as the appellants argue, are part of the consideration of the note, then the only premise, other than the contract for the delivery of the stock, is what we have noted as the desires of the parties. Those desires were to pool the stock, run the road over certain lands, pay a stock dividend, etc. By reason of such premises, including what we call the "desires of the parties," they go on and state what they shall do; and, first, Edgerton and Power and Sullivan, in the first paragraph, make their contract as to the sale of the stock for \$8,000. Passing this paragraph as complete in itself, we come to the other paragraphs, as to pooling the stock, etc. We are of opinion that the agreements contained in this contract are clearly separable. The first paragraph is complete in itself, and is independent of the others. It is observed that there is no time set when this pool shall be formed. The contract of pooling and operating the stock as a unit, and handling the road in harmony, is to run for ten years, but the note is payable in six months. Therefore, how can the performance of further agreements following paragraph 1. be a consideration for the note, and how can their nonperformance be a defense, when the note is payable absolutely nine and one-half years before the other acts contracted for are to be fully performed? The parties could not have contemplated such an anomaly.

We are of opinion that the consideration of the note was the delivery of the stock, and perhaps, also, the entering into the further agreements, but not the performance of the same. If the entering into the further agreements were also a part of

the consideration of the note, that consideration was performed, because the further agreements were entered into. This branch of the case we will examine.

It is true that it is quite clear that the parties desired the accomplishment of all the matters set forth in the contract of December 30th, and in paragraphs following paragraph 1; and it is true that they also contracted for the accomplishment of their desires in that respect. But these matters could not be accomplished, nor, indeed,* could they be intelligently contracted for, unless Power and Sullivan obtained the stock to put into the pool. The obtaining of that stock was a prerequisite to the accomplishing of the other matters set forth. To be sure, the accomplishment of those matters was within the contemplation of the parties when they made the contract as to the stock. It may even be conceded that Power and Sullivan would not have bought the stock unless all the parties had consented that they would make an agreement for the accomplishment of the other matters. But Power and Sullivan *did* buy the stock, and they, with Edgerton, *did* make an agreement as to the other matters. It may probably be, indeed, conceded that the consideration of the note was the delivery of the stock, and the entering into the further agreements. Let it be understood that we say the *entering into the further agreements*, not the *performing* of them; that is to say, the promising to perform may have been a part of the consideration of the note, but the performing of the same could not have been. Then the consideration of the note was paid, if the stock was delivered, and the further agreements were made; and on this construction of the situation, if the stock were not delivered or the further agreements were not made, the consideration failed. But the court offered to allow appellants to prove that the stock was not delivered, if they would make a proper allegation of this in their answer. That, as above noted, they declined to do, and, they declining to make this denial, the court struck out their proof.

That the further agreements were made was, in effect, in evidence, because the fact was alleged, and not denied by the

pleadings. Thus, while the *making* of the further agreements may have been a part consideration of the note, we cannot consent that their *performance* was also a part consideration. The contract, in its whole scope, denies such interpretation. The sale and delivery of the stock were preliminary to the performance of the other agreements, and preliminary, indeed, to a promise to perform, because it was first necessary that Power and Sullivan have said stock before they could make the pooling and other agreements. Again, we observe that no time was set for the performance of any of the other agreements. One of the other agreements as to an option was limited to one year, and the whole pooling contract was to run for ten years. The performance of such acts at such times never could have been intended as a part consideration, or their non-performance as a defense, to a note payable absolutely in six months. These views do not deny to defendants a remedy for any breach of the contract of December 30th, as to any agreements therein other than the sale of the stock, if any such breaches exist. All we hold is that any nonperformance of such agreements is not a defense to the note, because the performance was not, by the terms of that contract, a consideration for the note.

By reason of these views the judgment and order of the district court must be sustained.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

STATE, RESPONDENT, v. MASON, APPELLANT.

[Submitted June 4, 1896. Decided June 15, 1896.]

NEW TRIAL—Instructions—Specification of error.—A specification of error, which states that the court misdirected the jury in a material matter of law, by giving to the jury certain instructions, described by number, because said instructions did not state the law correctly and were not applicable to the case, is too general to permit the review of the instructions on appeal. (*Woods v. Berry*, 7 Mont. 195, cited.)

SAME—Notice of motion—Amendment.—An amended notice of motion for a new trial, filed after the time for serving the notice of intention has expired, is too late to cure a defect in the original notice.

SAME—Amended notice—New specification of error.—Where an original notice of motion for a new trial specifies no error in a particular instruction the notice cannot be amended so as to specify error in such instruction, for this would not be the amendment of anything contained in the original notice but the introduction of a wholly new specification. (*Gillespie v. Dion*, ante, page 183; *Barbour v. Briscoe*, 8 Mont. 214, cited.)

Appeal from Fourth Judicial District, Missoula County.

CONVICTION for assault with intent to commit murder. Defendant was tried before WOODY, J. Affirmed.

Toole & Wallace, for Appellant.

Henri J. Haskell, Attorney General, and *Ella Knowles Haskell*, for the state, Respondent.

DE WITT, J.—The defendant appeals from judgment of conviction of the crime of assault with intent to commit murder. Under that appeal he reviews the order denying a new trial. The notice of intention to move for a new trial makes the following specification of error, which is now relied upon under section 356, Criminal Practice Act, 1887: "That the court misdirected the jury in a material matter of law, by giving to the jury instructions numbered 19, 21, 24, 26, 31 and 34, because said instructions did not state the law correctly, and were not applicable to the case at bar."

The state contends that this specification is insufficient, and cites *State v. Fry*, 10 Mont. 407; *State v. Northrup*, 13 Mont. 534; *State v. Black*, 15 Mont. 143; *State v. Whaley*, 16 Mont. 574. The appellant does not contend that all, but that

only some, of the instructions named in the specification are incorrect in law. The specification sets forth that all of the instructions are erroneous, and not that each one is. Under the decisions heretofore made in this court, we are of opinion that this specification is insufficient. The specification here is not made as were the exceptions in *McKinstry v. Clark*, 4 Mont. 370, where the objection was directed at each instruction. (Hayne, on New Trial and Appeal, § 128, p. 363.)

In *Woods v. Berry*, 7 Mont. 195, this question is fully treated, and all of the former decisions in this court are reviewed. In that case the court, by Mr. Justice Bach, said: "We will now consider the first question: 'In what manner must an exception be taken to an instruction?' and in connection therewith the cases of *Griswold v. Boley*, 1 Mont. 545, and *Gum v. Murray*, 6 Mont. 10. The manner of taking the exception in those cases is almost identical with that in the case at bar, and the difference between the manner of taking the exception in those cases, and that used in *McKinstry v. Clark*, is manifest. In the former cases, including the case at bar, there was one, and only one, exception to several instructions in gross, while in *McKinstry v. Clark* there was a separate exception, taken separately, to each separate instruction objected to. The first form or manner of taking an exception was declared to be of no avail, by the case of *Griswold v. Boley* and *Gum v. Murray*."

As in *Woods v. Berry*, so in this case, the specification is to several instructions in gross, which method was there condemned; affirming *Griswold v. Boley*, 1 Mont. 545, and *Gum v. Murray*, 6 Mont. 10.

In *Woods v. Berry* the subject under consideration was an exception to instructions, and was decided at the time when, under the statute, counsel was required to take their exceptions upon the trial, and before the enactment of the statute which declares that the instructions are deemed to be excepted to. Laws 1887, (15th Extra Session, p. 67.)

But in principle there does not seem to be a distinction between exceptions to instructions, and specifications, on motion

for a new trial; and it was so held in *Griswold v. Boley*, 1 Mont. 545, in which the court said: "One other specification is as follows: 'The court erred in instructing the jury for the plaintiff as they were instructed by the court at the time.' This specification is of like character as the one already considered, and, for like reason, cannot claim the attention of the court. And for another reason; the instructions given on behalf of the plaintiff were not excepted to at the time, and, for all that appears in the record, the instructions went to the jury without objection. We can take no notice of exceptions not taken at the proper time and duly saved; and if this exception has been taken at the time the instructions were given, and this fact had duly appeared in the record, the exception is of such a general character that it does not meet the requirements of the code, which provides that the statement shall specify the *particular* errors upon which the party will rely." (See, also, *Gum v. Murray*, 6 Mont. 10, and numerous cases cited at the close of the opinion in *Woods v. Berry*; also, *Dale v. Purvis*, 78 Cal. 113, 20 Pac. 296; *Mock v. City of Muncie*, 9 Ind. App. 536, 37 N. E. 281; *Railway Co. v. McCartney*, 121 Ind. 385, 23 N. E. 258; *Wicke v. Insurance Co.* 90 Iowa, 4, 57 N. W. 632; *Hiatt v. Kinkaid*, 40 Neb. 178, 58 N. W. 700.)

We are of opinion that this specification is, under our own decisions, too general, and must be disregarded.

If this rule as to specifications is not a wise or prudent one, it has now been too long imbedded in the decisions of this court to be changed by judicial construction. The defendant in a criminal case is entitled to a trial under the constitution, but he is entitled to apply for a new trial, and to present his appeal, only by conforming to the statutes. This doctrine has been held for 20 years in this court. (*Courtright v. Berkins*, 2 Mont. 404; *Territory v. Hanna*, 5 Mont. 246, *State v. Gibbs*, 10 Mont. 210, *State v. Northrup*, 13 Mont. 534, *State v. Black*, 15 Mont. 143, *State v. Whaley*, 16 Mont. 574, *State v. Pilgrim*, 17 Mont. 311.)

After the time for serving notice of intention to move for a

new trial had expired, the defendant, by leave of the court, filed an amended notice of motion for a new trial. As a notice of motion for a new trial this was too late, and in this respect did not conform to the requirements of the statute, and was unavailing. As said by this court in *Territory v. Hanna*, 5 Mont. 247: "Appeals are matters of statutory regulation. There must be a substantial compliance with the statute, in order to confer jurisdiction upon the appellate court. The appellant is charged with the duty of perfecting his appeal in the manner provided by law, and error in this regard effects the jurisdiction of the appellate court." This doctrine has been affirmed by later cases above cited.

The next question is whether this amended notice is good as an amendment. But it does not amend any specification which was contained in the former notice. It does make a specification which seems to be good; for it states that the court erred in refusing to give an instruction as requested by counsel for defendant, which instruction so refused was the same as the instruction given, and numbered 30, except that the words "beyond a reasonable doubt" were contained in the offered instruction, but were stricken out of that as given. But the original notice of intention to move for a new trial did not pretend to specify any error as to instruction 30, or any error whatever as to refusing any instruction. The amended notice did not amend anything whatever that was contained in the original one. It introduced a wholly new specification. If it had been an amendment to anything contained in the original notice, or if it had specified properly and clearly anything that was insufficiently specified in the first, we would have before us another question; but, as the matter stands, it appears to us that the amendment seeks to make a specification entirely new, and which is unsupported by anything in the original notice. In *Gillespie v. Dion*, 18 Mont., 183, we held that the statement of contest in an election case was so defective as to be incapable of amendment after the time for giving such notice had expired. In that case we said:

"Under a statute that requires a specific statement to be

filed, an elector ought scarcely to be allowed to file a general objection without specific grounds of contest within ten days after the election result is declared, and thereafter to file his specifications based upon grounds perchance discovered after the lapse of ten days after the contest was instituted. In *Heyfron v. Mahoney*, 9 Mont. 497, cited by plaintiff [contestant], the transcript shows very full and explicit statements in relation to the various precincts where it was alleged by contestant that illegal votes were cast: The names of the alleged illegal voters were given at great length, and the exact canvass was set forth in detail. Upon the trial, Heyfron was allowed to amend by correcting certain voting lists by altering the spelling of the names of certain persons, and by adding the names of other persons to such lists, which did not affect the judgment in the case, upon the principle that immaterial defects in pleadings in election cases should be disregarded, that the ends of justice might be promoted. But that was a statement very different from the paper called a 'statement' in this case. Here the contestant is making a good statement out of nothing. But for lack of jurisdiction, heretofore discussed, the judgment is reversed and the proceeding dismissed." See, also, *Barber v. Briscoe*, 8 Mont. 214.

So, in the case at bar, it appears to us that the amended notice undertakes to make what is claimed to be a good specification out of nothing. We are, therefore, of opinion that it cannot be considered.

The specifications being thus disposed of, there is nothing further in the case to consider, and the judgment is therefore affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

BARNETT, RESPONDENT v. BROWN, APPELLANT.

[Submitted May 28, 1896. Decided June 15, 1896.]

18 367
28 328

NEW TRIAL—Conflict in evidence—Damages.—In an action for damages for injury to plaintiff's crop by reason of defendant obstructing the flow of water in plaintiff's ditch, where it appeared that plaintiff's crop consisted of timothy hay and potatoes; that he had need of the water about May 26th but did not obtain it until June 20th; that he then used it on such portions of the hay crop as he could irrigate day and night; that he had sacrificed his potato crop and a portion of the hay crop in order to save the balance of the hay, a verdict for plaintiff will not be disturbed on appeal where the evidence was conflicting as to whether plaintiff's method of irrigation was proper.

Appeal from Fifth Judicial District, Beaverhead County.

ACTION for damages. Defendant's motion for a new trial was denied by SHOWERS, J. Affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiffs sued the defendant to recover damages alleged to have been caused by the appellant's Brown's, trespass upon an irrigating ditch, by reason of which trespass plaintiffs were prevented from irrigating their crops in the spring and summer of 1893. Plaintiff and respondent Barnett leased the farm he lived upon, and the water right and ditch conveying water to the same, from the plaintiff Stiles. The appellant and defendant pleaded a justification, upon the ground that he had been damaged by an overflow of the ditch, and that by reason thereof had obstructed the ditch, on two occasions. He also relied upon the contributory negligence on the part of the plaintiff Barnett. Each of the plaintiffs asked damages for \$262.50 for the loss of the hay, \$100 for the loss of the potato crop, and certain other special damages and exemplary damages. Plaintiff Stiles having recovered damages in a former suit, a plea in bar as against him was sustained, and plaintiff Barnett became sole plaintiff in the action.

A jury returned a verdict for plaintiff for \$362.50. Judgment was entered on the verdict, and defendant moved for a

new trial. This motion was denied, and he appeals from the judgment and the order denying a new trial.

J. T. Galbraith, H. T. Burleigh and John T. Clayberg,
for Appellant.

- *Smith & Word and W. S. Barbour,* for Respondent.

HUNT, J.—Appellant, Brown, asks a reversal in the case upon the ground of insufficiency of the evidence to justify the verdict of the jury in awarding the respondent, Barnett, \$362.50, damages for the loss of his hay and potato crop. The evidence of plaintiff tended to show that in May and June, 1893, he had 114 acres sowed in timothy, and 5½ acres in potatoes. The only means by which he irrigated his farm was the water flowing through a ditch appurtenant to the premises on the west side of the land. On May 26th, the defendant, Brown, placed an obstruction at the head of this ditch, thereby stopping the flow of the water to plaintiff's farm. A few days thereafter, the plaintiff removed the obstruction, so that the water could flow; but still the water did not come, whereupon the plaintiff went up to the defendant's house, and found a dam in the ditch built so as to let the water back into a channel or slough near the defendant's house. The plaintiff also discovered defendant engaged in plowing in and filling the ditch from a point near his house to the mouth. The plaintiff had need of the water about May 26th, to irrigate his timothy, but got no water until June 20th. Meantime the ground had become very dry. When asked about the obstructions, the defendant said the ditch overflowed his land, and declined to allow the water to flow through the ditch until compelled to do so by the law. About June 8th an injunction was obtained restraining defendant from interfering with the water. The water finally ran to plaintiff's farm on June 20th, and the plaintiff's evidence tends to show that he used it on those portions of his farm where he could irrigate day and night, and cover the greatest amount of land, his object being to save as much of the tim-

othy hay as possible from absolute ruin. He irrigated about 76 acres of timothy, but after he had irrigated this amount of ground once, it was still so very dry that it was necessary to irrigate it a second time, in order to preserve the stand of grass, and obtain the best possible timothy crop. Notwithstanding these precautions, it appears that from this 76 acres he did not harvest as good a crop as he would have harvested had he had water in time to irrigate properly. Thirty-seven acres of timothy were completely lost by being burnt out by drought, plaintiff testifying that he was obliged to sacrifice this in order to save the balance.

The appellant offered the evidence of skilled farmers to show that plaintiff's method of irrigation was faulty, and that he took too much time to irrigate his land; but the plaintiff met this contention by the evidence of equally experienced persons, who testified substantially that the plaintiff's use of water was reasonable and necessary in order to save the timothy, not only for the year 1893, but to prevent a permanent injury to the timothy for several years to come. The jury accepted plaintiff's evidence as true. It also appeared satisfactorily to the jury that the potato crop was lost, because it was necessary to use all the water that could be obtained to save the timothy, and that, as between the loss of one or the other, plaintiff was justified in trying to save the timothy, and sacrificing the potatoes.

There was a conflict in the testimony upon the question of the proper use of the water by the plaintiff, but it was the particular province of the jury to determine all such questions of fact, and to decide upon which side the preponderance of evidence lay. We have so often decided that where there is a substantial conflict in the evidence, but where there is evidence to sustain the finding of the jury, and where the district court has overruled a motion for a new trial, the case will not be reversed for insufficiency of evidence to justify the verdict, that it is unnecessary to cite authorities upon the point.

It is argued by the appellant that the verdict of the jury was excessive in the values fixed for the hay and potatoes lost

to plaintiff, but there is ample testimony to justify the conclusion of the jury as to both these items.

Just how the jury separated the damages does not appear by their verdict; but, doubtless, appellant's counsel are correct in their brief when they refer to the damages for hay loss as found to $1\frac{1}{2}$ tons per acre upon $37\frac{1}{2}$ acres of ground, which plaintiff lost in his efforts to preserve the rest of his crop. The jury's estimate of the value of the potato crop lost is clearly justified by the evidence.

The jury evidently disregarded the defendant's theory of contributory negligence throughout the case, and predicated their verdict upon the evidence of plaintiff's inability to save the potatoes because of his efforts to save the hay.

There being no questions of law presented for review, the only course for this court to pursue is to affirm the judgment.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

DU VIVIER ET AL., APPELLANTS, v. PHILLIPS ET AL.,
RESPONDENTS.

[Submitted June 11, 1896. Decided June 15, 1896.]

EVIDENCE—Writings—Cross-examination.—Where a stenographer is called to prove the testimony given by a witness on a former trial of the case, in respect to having written a certain letter, it is error to refuse to permit the adverse party to cross-examine him for the purpose of bringing out the testimony of the witness as to the circumstances under which the letter was written, or to reject such proof when the adverse party makes the stenographer his own witness. (*Territory v. Rehberg*, 6 Mont. 471; *State v. Jackson*, 9 Mont. 518; *Kennelly v. Savage*, ante, page 119, cited.)

Appeal from Eighth Judicial District, Cascade County.

ACTION to recover for goods sold. Plaintiff's motion for a new trial was denied by BENTON, J. **Reversed.**

Leslie & Downing, for Appellants.

Douglas Martin and *Ed. L. Bishop*, for Respondents.

DE WITT, J.—The defendants appeal from an order denying their motion for a new trial. They specify error of the court in excluding evidence as follows:

The action was for the price of goods sold and delivered. It appears that the case had been once before tried. At the second trial, from which this appeal originates, it appears that a witness (Coombs), who was one of the defendants, was absent. The stenographer who took the testimony on the first trial was called as a witness by plaintiffs to prove certain testimony given by Coombs on the former trial. The stenographer testified that Coombs had testified as to a certain letter written by himself to the plaintiffs, and which was in evidence on the former trial. The court allowed this testimony to be introduced. Upon its introduction the defendants desired to cross-examine the stenographer, that he might state the testimony of Mr. Coombs given on the former trial as to the circumstances and facts in regard to the writing of the letter. This was excluded by the court, it appears, because the court held that it was not proper cross-examination. But see *Territory v. Rehberg*, 6 Mont. 471. The defendants thereupon made the stenographer their own witness, and then asked him, as their own witness, what the testimony of Coombs had been on the former trial as to the writing of this letter, which had already been introduced in evidence. The plaintiffs objected to this testimony on the ground that it was incompetent, immaterial, and irrelevant. The objection was sustained by the court. This the defendants assign as error. We are of opinion that it was error. Section 626, Code of Civil Procedure, 1887, is as follows:

“When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole of the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood, may also be given in evidence.”

We held in *Kennelly v. Savage*, ante, 119, that where, for

the purpose of impeaching a witness, letters purporting to be written by him are introduced, it is both competent and material that he should be allowed to explain the circumstances under which and for which the letters were written. See, also, *Territory v. Rehberg*, 6 Mont. 471, 13 Pac. 132, and *State v. Jackson*, 9 Mont. 518, 24 Pac. 213.

For this reason the order denying a new trial must be reversed, and the case remanded, with instructions to grant a new trial.

The defendants also claim error in instruction No. 1, but they do not discuss such alleged error in their brief.

Reversed.

HUNT, J., concurs. PEMBERTON, C. J., not sitting.

ROSSITER, APPELLANT, v. LOEBER, RESPONDENT.

[Submitted June 9, 1896. Decided June 15, 1896.]

PROMISSORY NOTE—Action by endorsee—Duress—Bona fides—Order of proof.—In an action by an indorsee of a promissory note in which the defendant pleaded want of consideration and duress and that the plaintiff had purchased the note after maturity with knowledge of such defenses, the endorsee is not obliged to show in his case in chief that he purchased the note without notice of such defenses, but may do so in rebuttal, after the defendant's evidence has made necessary an affirmative showing of good faith.

SAME—Duress—Evidence.—The defense of duress in the execution of a promissory note is established by uncontradicted evidence to the effect that defendant, who owned a fourth interest in a mine, which had been leased, was surrounded by a party of twelve or fifteen miners, employees of the lessee, who demanded a settlement of their wages; that one of the miners told defendant, that if he did not settle their claims right then he would shoot him, and another told him that if he got on the wagon they would pull him off; that defendant was then crowded by them into a room in a hotel and held there for two hours, being told when he tried to go out, that he could not leave until he settled; that a witness with defendant was told that he could go but if defendant attempted to make a move for the wagon, they would pull him off with a rope; that the witness communicated this threat to defendant, who then signed certain notes saying that he did so to get away.

SAME—Duress and want of consideration—Instructions.—Where duress and want of consideration were pleaded in defense to an action on a promissory note and duress was proved, it was error to charge the jury that it was incumbent upon the defendant to establish his defenses by a preponderance of the evidence, since defendant was not bound to prove both such defenses, nor by a preponderance of the evidence.

SAME—Duress—Character of threats.—Under a defense of duress, in the case at bar, the

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question was not as to whether the threats were of such a character as to be likely to terrify a man of defendant's firmness, but whether the defendant, presumably of ordinary firmness, was actually threatened with violence or restraint, or was restrained and actually and reasonably in fear of personal injury or confinement, under the influence of which he acted in executing the note.

PLEADING—*Denial of knowledge sufficient to form a belief.*—A denial that as to certain facts stated, the pleader "has no knowledge or information sufficient to form a belief and therefore denies the same," is insufficient. (*State ex rel Miltstead v. Butte City Water Co.*, ante, page 199, cited.)

Appeal from Second Judicial District, Silver Bow County.

ACTION on promissory note. The cause was tried before McHARTON, J. Defendant had judgment below. Affirmed.

Statement of the case by the justice delivering the opinion.

Action on a promissory note made by the defendant, Loeber, to William Schneider or order, for \$350, dated October 8, 1891, and due on or before November 8, 1891.

Plaintiff alleged that on November 1, 1891, and before the note became due, the payee, Schneider, transferred the same by indorsement to plaintiff, and that plaintiff is now the owner and holder for value. Judgment is prayed for the face of the note, interest and costs.

Defendant admitted the execution of the note, and that it had not been paid, but denied that the note was transferred prior to maturity. Defendant further set up that the note was made and executed without consideration, and that it was made under duress by the payee and others, and that the plaintiff was cognizant of the fact that the note was made and executed without consideration and under duress, before the alleged purchase by him of the note.

The replication denied knowledge on the part of plaintiff concerning the alleged duress and lack of consideration and all other affirmative matter in the answer. Plaintiff also avers in his replication that the defendant admitted to the payee that the note was legal and valid, and promised to pay the same, and that plaintiff relied upon the truth of said statement, and that the defendant is now estopped from setting up the defense of duress.

There was a trial to a jury, and a verdict for the plaintiff.

Defendant moved for a new trial, and the motion was granted. Plaintiff appeals from the order sustaining the defendant's motion for a new trial.

John W. Cotter, for Appellant.

Defendant does not say that he was in fear of any bodily harm, and his witness, Nickel, does not attempt to say so; on the contrary, the evidence of both of them simply shows that the men were only demanding their pay. Duress by threats must have caused actual fear of bodily harm, or of some grievous wrong. (*McClair v. Wilson*, 31 Pac. Rep. 502; *De La Cuesta v. Insurance Co.*, 9 L. R. A. 631; *Shuttuck v. Watson et ux.*, 7 L. R. A. 531; 5 *Lawson on Rights, Remedies and Practice*, §§ 2364-2395.) The evidence of the defendant and his witnesses further shows that Schneider was not present and took no part in the demonstration against defendant, nor in imposing any duress upon him. Duress must be imposed by the party himself, or with his knowledge or consent. (5 *Lawson on Rights, Remedies and Practice*, § 2367 and note.) Proof of circumstances that might excite suspicion are not sufficient to defeat plaintiff in this action. (*Farrell v. Lovett*, 68 Me. 236; *Witte v. Williams*, 28 Am. Rep. 298.) Instruction No. 1, complained of by defendant, informs the jury that every presumption is in favor of the note sued upon in the action, and if they find that it was executed and delivered by the defendant to the payee named therein for value, without any fraud, compulsion or duress, and was afterwards transferred to the plaintiff and is unpaid, they should find a verdict in plaintiff's favor. We submit that the instruction states the correct rule of law applicable to cases of this character. (19 *Am. & Eng. Ency. of Law*, page 78, note 3; *Witte v. Williams*, 28 Am. Rep. 294; *Goodman v. Simons*, 20 How. 343, L. E. 954; *Murray v. Lardner*, 2 Wall. 110; *Abbott's Trial Evidence*, page 404; 2 *Wharton on Evidence*, 1060.) A negotiable promissory note imports a consideration and the burden of proving want of consideration or duress is on the defendant. (*Lipsmeier v. Veshlage*, 29 Fed. 175, note; *Dean*

v. *Carrutt*, 108 Mass. 242; *Kneeland v. Lawrence Bros.*, 140 U. S. 200, L. E. 204; Story on Promissory Notes, § 7; Parsons' Notes and Bills, 185, 188, Note H, 193; 1 Rice on Evidence, page 143.)

F. T. McBride, for Respondent.

Duress consists not merely in the act of imprisonment or other hardship to which the party was subjected, but in the state of mind produced by these circumstances and in which the act sought to be avoided was done. (*Blair v. Coffman*, 5 Am. Dec. 659; *Hatter v. Greenlee*, 26 Am. Dec. 370 and note 374, 375 and 376.) If a person is in a perturbed state of mind and his debtor takes advantage of his condition, and employs menace to compel him to cancel the debt, it would be a gross fraud and the debtor could no more plead the relinquishment of the debt as a defense than if he had compelled it by the direct use of physical force. (*Parmentier v. Pater*, 13 Or., 121.) Any contract produced by actual intimidation ought to be held void whether it arises as a result from merely personal infirmity or from circumstances which might produce a like effect upon persons of ordinary firmness. (Evans Pothier on Obligations, 1 to 18; Am. & Eng. Ency. of Law, page 68.) To establish the defense of duress it must be shown that the party performed the act under the influence of the threats or violence; it need not be shown that the threats were made directly to the party influenced. (*Feller v. Green*, 26 Mich. 70; *Dunham v. Griswold*, 100 N. Y. 224; *Snyder v. Braden*, 58 Ind. 143; *Taylor v. Jaques*, 106 Mass. 291; *Sartwell v. Horton*, 28 Vt. 370.) Instruction No. 1, given at the request of plaintiff, does not correctly state the law. In this instruction the jury are told that every presumption was in favor of the note sued upon in this action. Whereas, as a matter of law, every presumption was in favor of the note sued upon; defendant's answer had interposed the defense of duress, of fraud and intimidation and of want of consideration, and had put the burden proving *bona fides* upon the plaintiff. (*Thamling v. Duffy*, 14 Mont. 567.)

HUNT, J.—The plaintiff, on the trial, testified that he thought he purchased the note after maturity, that he was the owner of the note, and that it was not paid. The plaintiff then rested, whereupon the defendant moved for a nonsuit upon the ground that it appeared that the witness purchased the note after maturity, and that, therefore, it was not entitled to any protection in his hands as an innocent purchaser; that the answer challenged the consideration for the note, and, no answer having been given to the plea of no consideration, under such circumstances it was necessary for the plaintiff not only to show the note, and that he was the owner of the note, but also that there was a consideration for its execution. The court overruled the motion. The defendant saved his exceptions, and has argued to us that under the decision in *Thamling v. Duffey*, 14 Mont. 567, the pleading of the defendant denying the purchase of the note before maturity, and alleging notice of the defenses set up in the answer, was sufficient to require the plaintiff in his case in chief to prove that he purchased the note before maturity, and without notice of such defenses. But we think defendant's construction of the decision of the court in *Thamling v. Duffey* is not accurate. A careful reading of the opinion with relation to the pleadings that were before the court in that case will demonstrate that the conclusion of the court did not change the well-established rule of law as laid down by Daniel on Negotiable Instruments, who says (§ 166) :

“But if the defendant show that there was fraud or illegality in the origin of the bill or note, a new coloring is imparted to the transaction. The plaintiff, if he has become innocently the holder of the paper, is not permitted to suffer; but, as the knowledge of the manner in which it came into his hands must rest in his bosom, and the means of showing it must be much easier to him than to the defendant, he is required to give proof that he became possessed of it for a sufficient consideration. If he is innocent, the burden must generally be a light one; and, if guilty, it is but a proper shield to one who would be, but for its protection, his victim.”

Section 167: "It was formerly considered necessary, in order to enable the defendant to put the plaintiff on proof of consideration, that the defendant should have given the plaintiff notice to prove consideration; but it is well settled now that no such notice is necessary, and it is seldom given. It was also formerly held that, where the consideration given by the plaintiff was disputed, and a notice to that effect had been given, the plaintiff must go into his whole case in the first instance, and could not reserve proof of consideration as an answer to the defendant. But now the plaintiff is only required to give affirmative proof of consideration after the defendant has given evidence tending to rebut the *prima facie* case which the production of the instrument makes out."

The approved quotation from *Bank v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402, in *Thamling v. Duffey*, very clearly states the law to the effect that the burden of proving good faith is always upon the party asserting his title as a *bona fide* holder in a case where the *proof* shows that the note has been fraudulently or illegally obtained from its maker, but such a party makes out his title by presumptions until it is impeached by *evidence* showing the paper had a fraudulent inception. When this *evidence* is before the court or jury, then the plaintiff can no longer rely upon the presumption, but must affirmatively show good faith. And so in this case, the plaintiff, by producing the note and furnishing evidence of the fact that he was the holder and owner at the time of the commencement of the suit, made out a *prima facie* case; that is, there was competent evidence tending to prove propositions of fact, which, if not rebutted or controlled by other evidence, stood as sufficient proofs of such propositions of fact.

The defendant then undertook to prove that the note was given under duress, and offered evidence tending to support such averment. Having introduced this evidence, the burden of introducing evidence to prove that he was a *bona fide* holder for value was yet on the plaintiff; that is, his presumptions were overcome, and he had to show good faith by affirmative evidence on rebuttal. The plaintiff might have offered his

evidence of good faith when he first presented and proved his note, or he might have delayed offering it until after the defendant introduced his testimony. That was a matter largely in the discretion of the plaintiff, subject to rules of practice in a court, which has generally the right to control the order of proof, limited always by the statutes and manifest justice of the case. But whatever rule might have been prescribed for the introduction of testimony, the burden of making out good faith always rested upon the plaintiff, whether before or after the testimony of defendant had been introduced tending to show that the note was not in plaintiff's hands as a *bona fide* holder. See, also, *Burnham v. Allen*, 1 Gray 496; *Greenleaf on Evidence*, § 172. This view is also in accord with the decision of the supreme court of the United States in *Commissioners v. Clark*, 94 U. S. 278, where it was decided that where the question is whether the indorsee and holder had notice of the prior equities between antecedent parties to the instrument, the holder of such note under such circumstances is not obliged to show that he paid value for the instrument until the other party has proved that the consideration was illegal, or that it was fraudulent in its inception. See *Meadowcroft v. Walsh*, 15 Mont. 544; 2 *Greenleaf on Evidence*, § 172.

We therefore think that the motion for a nonsuit was correctly overruled, and that the court properly denied to the defendant permission to open and close upon the question of duress.

The evidence to sustain the plea of duress showed substantially the following state of affairs: The defendant, Loeber, went to Sheridan, Montana, about October 7, 1891, to receive the concentrates of the Toledo mine in behalf of two of the lessees of the mine. On the next morning, directly after breakfast, about 8 o'clock, some 12 or 15 miners gathered about the person of the defendant, and when he was about to take his team, and leave Sheridan for Dillon, some 40 miles away, some of them informed him that he could not go. One of them, Erick by name, told him that if he did not remain in Sheridan, and settle the matter of the claims of the men right then, he would

shoot him. Another one, by the name of Storm, told him that if he got on the wagon they would pull him off, and that they had a rope there. The defendant immediately thereafter was crowded by the men into a room in the hotel, and for about two hours he was held there, and told that he must settle the claims against the mine. He remonstrated by saying that he did not owe anything. The crowd then told him that he could sign the notes on the pay roll. The note in suit was one of several amounts on the pay roll, which was for work that the men had done at the mine. The defendant testified that two men, named Wier and Spooler, had leased the mine, and had worked the men, and it was the time of these men that was included in this pay roll handed to the defendant. The defendant denied that he owed any part of the pay roll, and said that he was induced to sign the note simply because he wanted to get away from Sheridan, and out of danger. He testified that the men used rough language, and said that he could not go away until everything was settled. Soon after giving the notes, the defendant left; and on October 24th he published in the *Madisonian*, a newspaper published at Virginia City, a notification to the public against purchasing the note involved in this suit and others which the defendant had executed, for the reason that all such notes were obtained through intimidation and coercion and without consideration. On cross-examination the defendant said that he was not interested in the labor at the mine, that he did not hire the men, that he owned one-fourth interest in the mine, and took the concentrates from the lessees and shipped them because they owed him money, and they wanted him to pay himself out of the concentrates, since they could not pay him. He further said that the miners wanted some kind of a settlement from him on the day of the trouble, before he attempted to get on the wagon; that he never saw the payee, Schneider, that day; that the men crowded around him and shoved him ahead until he was inside the room; that they stood in the doorway, and when he tried to get out told him that he could not go; that Schneider, the payee of this note, was not there at that time; that the men went over

to the plaintiff's store in Sheridan, and brought the paper upon which the notes were made out; that one man, by the name of Edwards, was the only one who said that he would protect defendant; Edwards told him to sit down, and he would see that nothing happened to him. /

Henry Nickel, who was with Loeber, corroborated the testimony of Loeber in its more material parts, and said: That one of the lessees of the mine told the men to go after Loeber, whereupon they said to Loeber, "You have to pay." One of the men told Nickel that he could go, but that Loeber had to stay, and that if Loeber "makes a move for that wagon they will pull him off with a rope;" and that another—one Storm—said that they had shooting irons and a rope, and that, if Loeber did not do something pretty quick, there would be trouble; that from the way the men talked he thought Loeber would have trouble; that they crowded around Loeber, and wanted the money; that he (Nickel) told Loeber of the threat to pull him off the wagon, and that Loeber replied, "Anything to get away from here;" that Loeber was worried, did not know what to do, was nervous, trembling and wanted to get away, and did not feel free. Nickel said to Loeber: "If you move off, there will be trouble, and what are you going to do? Do you want to stay here a couple of days? I will stay with you, or, if you don't, you will have to do something." To this Loeber replied "I will sign those notes to get away from here;" that after the notes were signed, and shortly after noon, the defendant and Nickel left on the stage; that the wagon which they had had in front of the hotel was not used, and that they did not see Schneider that day.

The testimony on rebuttal was to the effect that about 11 o'clock on the day the notes were signed the payee, Schneider, went to Schultz's house in Sheridan to get his note; that he went over there, and found Loeber, who pointed the note out to him, and said nothing about having been compelled to execute the note or anything of the kind. Schneider also testified that upon that day, about noon, Loeber went to his house, and

told him that he would send him the money due on the note from Dillon the next day, but that the money did not come; that he could not say whether he transferred the note to this plaintiff, Rossiter, before or after it became due; that Loeber told him in June, 1891, that he was interested in the lease, and was going to pay all the men off, and that he (Schneider) never heard of any duress or compulsion brought to bear on Loeber at the time of the execution of the note, and knew nothing of the same. Fred Schultz, the hotel keeper at Sheridan, a witness for plaintiff, said that he did not hear any threats that day made in the office of the hotel; that he was there when the notes were signed; that there were "no threats of any consequence that I know of;" that "there was no imprisonment, or barred doors, or anything of that kind;" that there were may be fifteen persons in the office at the time Loeber gave the notes, which was about 10 o'clock in the morning; that Loeber came into the office on his own accord, and the men came in with him; that Loeber made no complaints about threats or duress to him, and none were made at that time. Witness was asked then whether he thought from the condition of the community that day, and from what he saw and heard, Mr. Loeber was in danger of his life or injury if he did not sign those notes. Against the objection of the defendant the witness was permitted to answer. His reply was: "I don't hardly think that he would have been injured or shot if he had refused to execute those notes. I didn't hear him say anything of that kind." This witness on cross-examination said that he knew some ten or fifteen men were congregated about Loeber there, asking Loeber to execute the notes or give them money, and that he knew Loeber did not go away with the team that was hitched up for him to go away with; that he "expected that these men prevented Loeber from going;" that he noticed nothing peculiar about Loeber's condition of mind at that time; that when the men and Loeber went into the office of the hotel, they did not push Loeber, but "kind of walked in a crowd;" that witness did not pay much attention to the execution of the note. Another rebutting witness,—Waldert,—

who had worked in the Toledo mine, said that he did not go to the hotel until the notes were being signed, but was about, and did not hear any threats of shooting or hanging Loeber upon the day the notes were executed; that Loeber himself proposed to give duebills to the men; that after the notes were executed Loeber made no complaint about the manner of their execution at all, but said that he would have to pay them when they became due, and thereafter Loeber again said that he would pay the notes upon the day they were due; that in a few days witness at Butte asked Loeber for the amount of his note, but Loeber declined to pay until it was due.

The plaintiff, Rossiter, on rebuttal swore that he was in his store at the time the notes were executed, and saw nothing that would induce him to go out, and see what was going on, but understood from rumor that the miners were in town, trying to get their pay; that Loeber never said anything to him with reference to the notes, but that he read in the *Madisonian* the notice of Loeber, and thinks he read it before he got the note, and also thinks he bought the note in December, 1891, after its maturity.

The court granted the defendant's motion for a new trial upon the ground of errors of law in the instructions given, and our decision affirming the ruling of the district court will be based upon the same ground. But we have stated the testimony for the purpose of explaining the facts constituting the duress relied upon by the defendant, and for the purpose of expressing the opinion that the court would have been well justified in setting aside the verdict of the jury upon the ground that it was unsupported by the evidence.

There is really no substantial conflict in the most material parts of the testimony of the witnesses of the plaintiff and the defendant concerning affairs just prior to the execution of the note in suit. There is no denial of the testimony of Loeber and Nickel to the effect that Loeber was told that he could not go, but would have to settle, and that in obedience to that threat he was prevented from taking the team which he had hired to carry him to Dillon. It seems clear from the evidence

that the conduct of the men who gathered about Loeber in the hotel demanding a settlement, and refusing to allow him to go, and from the threats made and communicated by Nickel to Loeber that the men would pull Loeber off of the wagon if he made an effort to leave without settling, constituted a menace of violence, and that Loeber acted upon that menace, and yielded to the restraint and to a reasonable fear of immediate danger to his person. We find no positive denial of the statement of Loeber to the effect that when he tried to go out of the room he was told he could not leave. Nor were the threats alleged to have been made by Erick and Storm denied; nor is it denied that he was actually detained by the men against his will, and told that he must settle before he left Sheridan. On the contrary, one of the plaintiff's witnesses frankly said he "expects these men did prevent Loeber from going." If the statements of Loeber and Nickel were untrue, it occurs to us that it would have been very easy to specifically contradict them by the evidence of some of the men who were present with the crowd before the notes were signed. But, as the record discloses the testimony, we believe it sufficiently appears by the uncontradicted substance of the testimony of the defendant that the will of Loeber was overcome by restraint and the danger of personal injury; and that the reason Loeber executed the notes was his fear of danger and his desire to get away, rather than to liquidate a claim of an amount of money due to the payee of the note. The defense of duress was made out. (*McPherson v. Cox*, 86 N. Y. 472; *United States v. Huckabee*, 16 Wall. 414.)

If Loeber owed Schneider, or any one else, to whom he gave notes at that time, any money, and refused to pay him, the courts are open for redress, but the law will not suffer any man to surround another by force, restrain him of his liberty, and under threats of violence to his person place him in a state of compulsion or necessity wherein he is influenced to incur a civil liability. Written obligations, whether for a debt due or not, made under such circumstances, will not be enforced at the instance of the person who takes them with notice of the

circumstances connected with their inception, as plaintiff in this case clearly did, if the maker plead and prove such duress as a valid defense.

Duress having been proved on the trial, the question of no consideration is immaterial to the further discussion of the case. Accordingly it was error in the district court to instruct that it was incumbent upon the defendant to establish his defense of duress and compulsion *and* want of consideration by a preponderance of the evidence, and, if he failed to do so, plaintiff should recover. He was not bound to prove both such defenses; either, if established, would defeat a recovery by plaintiff.

What we have heretofore laid down, namely, that the burden of proving that plaintiff was a holder in good faith was always upon him, relieved defendant of establishing the defense of duress by a preponderance of evidence. It was always upon plaintiff alone, who acquired this note subject to the defenses which might be interposed by defendant against its payment, to prove his *bona fides* to entitle him to recover.

By instruction No. 5, the jury, among other things, were charged that, unless they found that the threats were of such a character as to be likely to terrify a man of defendant's firmness, then the note sued upon was a valid obligation, etc. The question in the case under the testimony was whether this defendant, presumably of ordinary firmness, was actually threatened with violence or restraint, or was restrained, and was actually and reasonably in fear of personal injury or confinement, and acted in executing the note under the influence of such threats and fears. If this question was affirmatively answered, plaintiff could not recover, and, if defendant's testimony was true, and he was terrified, and acted under compulsion, whether the threats of violence were of such a character as to be likely to terrify a man of his assumed firmness became immaterial.

If the case is tried again, defendant should amend that portion of his answer which pleads: "That as to whether * * the payee named in the said note transferred the same by indorsement, * * * or whether plaintiff is or ever

has been the owner or holder of said note defendant has no knowledge or information sufficient to form a belief, and therefore denies the same." Such a denial is bad. (*State ex rel. Milstead v. Butte City Water Co., ante, 189.*)

The learned judge who tried the case properly granted a new trial. We think he was justified in doing so, not only upon the ground of errors of law, but, as indicated, we think he ought to have done so on the whole evidence in the case. The order granting a new trial is affirmed.

Affirmed.

DE WITT, J., concurs. PEMBERTON, C. J., not sitting.

MCMILLAN, APPELLANT, v. HEFFERLIN, RESPONDENT.

[Submitted June 16, 1896. Decided June 22, 1896.]

PROMISSORY NOTE—Alteration of date—Accommodation endorser.—An accommodation endorser of a negotiable note is released from liability by a change in the date of the note without his consent after endorsement, and the mere knowledge by the endorser of the terms of a contract between the maker and the payee, for the fulfillment of which the note was given, is insufficient to operate as an implied consent that the date of the note might be changed to conform it to the intention of the parties to such contract. Now would an attempt by such endorser, after receiving notice of protest, to make terms with the holder for future payment, operate as a consent to or ratification of such alteration, in the absence of knowledge that it had been so altered.

Appeal from Sixth Judicial District, Park County.

ACTION on promissory note. Judgment was rendered for the defendant below by HENRY, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action on two promissory notes alleged to have been made and delivered for value received by M. K. Brundage on the 25th day of February, 1893, to Thomas H. Ensor, payable respectively four and six months after date thereof and indorsed by the defendant prior to their delivery, and afterwards transferred by Ensor to plaintiff.

The execution of the notes and the indorsement thereof by the defendant are not denied. The defendant alleges as a defence to this action that after the execution of said notes, and after said defendant had indorsed them, the date thereof was altered by M. K. Brundage from the 15th day of February, 1893, to the 25th day of February, 1893, without the knowledge or consent of the defendant.

To this answer the plaintiff replied, denying the allegation as to the change, and alleging: "First, that the said notes in suit were executed by the said M. K. Brundage to the payee in payment for certain rights which the said Thomas H. Ensor was about to convey to the said Brundage; second, that by the terms of the contract entered into between the said Brundage and Ensor, of which the said Hefferlin had full knowledge, the said Brundage was to have four and six months after the conveyance to him of said rights within which to make payment, for which deferred payments the notes in suit were executed; third, that the conveyance of said rights was not completed as early as was anticipated by the parties thereto at the time the contract therefor was executed, and, if the dates of said notes were changed after their execution by the said Hefferlin, said alteration was made by Brundage to make them conform to the intention of the parties to the original agreement relative to the time to be allowed him to make the deferred payments for said rights; fourth, that said Hefferlin, prior to his indorsement of the said notes, knew the terms of said original agreement, and the purpose for which said notes were being executed, and indorsed the same solely for the purpose of enabling them to be used by said Brundage in the performance of said agreement on his part, and that said alteration, if any was made, was so made, as above stated, to make them conform to the intention and purpose of said Hefferlin and all of the other parties thereto."

The case was tried upon the issues joined to a jury. At the close of the plaintiff's testimony the defendant moved the court to instruct the jury to render a verdict for the defendant, which motion was sustained, and a verdict in accordance

therewith returned for the defendant. Judgment was rendered upon said verdict, and from said judgment plaintiff appeals.

Savage & Day, for Appellant.

The controversy in this case is as to the consent of the surety. If we have shown any evidence of or circumstances from which the jury might infer his consent, we were entitled to have the question submitted to a jury, and the court erred in refusing to admit the notes in evidence. (*Jacobs v. Gilreath*, (S. C.) 22 S. E. Rep. 757.) The court seems to have proceeded upon the theory that the surety would be released unless he expressly authorized this alteration. But such is not the correct rule. The holder of a negotiable instrument has a right to correct a mistake in a negotiable instrument to make it conform to what all parties to it agreed or intended it should have been. (Parsons on Bills and Notes, 569, 570, 571; *Hervey v. Hervey*, 15 Me. 357; *Duker v. Franz*, 7 Bush. 273; *Ames v. Colburn*, 11 Gray 390; *Busjahn v. McLean*, 29 N. E. Rep. 494; *Derby v. Thrall*, 44 Vt. 413.)

Campbell & Stark, for Respondent.

A material alteration of a note renders it void even in the hands of an innocent purchaser. (Randolph on Commercial Paper, § 84; Daniels on Negotiable Instruments, 1376; *Wood v. Steele*, 6 Wall. 80; *Cronkhite v. Nebecker*, 42 Am. Rep. 127; *Jourden v. Boyce*, 33 Mich. 301; *Aldrich v. Smith*, 37 Mich. 468; *Holmes v. Trumper*, 22 Mich. 427; *Hunter v. Grey*, 10 Am. Rep. 232; *Bradley v. Mann*, 37 Mich. 1; *Woodworth v. Bank of America*, 10 Am. Dec. 72; *Ruby v. Talbot*, 21 Pac. Rep. 72.) There can be little or no question but that the change in the date of the note after its execution is a material alteration. (*Wood v. Steele*, *supra*; Randolph on Commercial Paper, *supra*; Daniel on Negotiable Instruments, *supra*; *Cronkhite v. Nebecker*, *supra*; *Mitchell v. Ringold*, 5 Am. Dec. 433; *Britten v. Dierker*, 2 Am. Rep. 553; *Wilson v. Hotchkiss*, 81 Mich. 172; *Franklin v. Baker*,

29 Am. State Rep. 547.) It cannot be claimed that the respondent, Hefferlin, ratified the change in the notes, as there is nothing that would warrant a finding of that kind, and even though he had verbally ratified the same, such ratification would be void. (*Wilson v. Hayes*, 42 N. W. 467.)

PEMBERTON, C. J.—The only question presented by this appeal is as to whether there was any evidence tending to show that the defendant had knowledge of or consented to the change in the date of the notes, or, after having knowledge thereof, ever ratified the same. There is no contention as to the law in the case.

It is conceded that if the change in the date of the notes was made by Brundage without the knowledge or consent of defendant, and that defendant never thereafterwards ratified such change, then the plaintiff is not entitled to recover in this action. The only evidence as to the knowledge or consent of defendant to the alteration in the notes is that of Brundage, the maker of the notes. He testified that Mr. Hefferlin did not authorize him to make any change in the dates or terms of the notes; that there was no contemplation of any necessity therefor at the time Hefferlin indorsed them. He also testified that Mr. Hefferlin has never at any time ratified the change of the date of said notes. The appellant contends that the defendant knew the terms of the contract for the fulfillment of which the notes were executed by Brundage and indorsed by the defendant, and, therefore, as the notes were changed to conform to the intention of the parties to said contract, that it cannot be contended that it was changed against the interest, or without the implied consent, of the defendant. But in reply to this it is sufficient to say that the defendant was not a party to the original contract for the performance of which the notes were executed by Brundage. He was simply an accommodation indorser, as far as shown by the record. It is also contended by the appellant that after the defendant received notice of protest of the notes for want of payment he attempted to make terms with the holder for the payment

thereof in the future, and from this fact the appellant contends that the defendant consented to or ratified the change in the dates of the notes. But it does not appear that at the time defendant received notice of protest of the notes, and when he was seeking to make terms for the payment thereafter, he knew that the notes had been altered. A careful inspection of the record and of all the testimony in the case does not disclose the fact that the defendant ever authorized the alteration in the notes, or ever by word or act ratified the same after the alteration was made. In fact the positive evidence is all to the effect that the defendant did not authorize such alteration, and that he has not at any time in any manner ratified the same.

We are therefore of opinion that there was no error in the action of the court in instructing the jury, on the evidence offered by the plaintiff, to return a verdict for the defendant. The judgment appealed from is therefore affirmed.

Affirmed.

DE WITT and HUNT, JJ., concur.

STATE EX REL. COMMISSIONERS OF CUSTER
COUNTY, RELATORS, v. THE STATE BOARD
OF EQUALIZATION, RESPONDENT (YEL-
LOWSTONE COUNTY, INTERVENOR).

[Submitted June 15, 1896. Decided June 22, 1896.]

TAXATION—Right of way through Indian reservation—Yellowstone County.—By the act of congress of February 12, 1889, granting to the Bighorn Southern Railroad Company a right of way through the Crow Indian reservation, the land embraced within such right of way was thereby segregated and thrown open to settlement within the meaning of the act of March 5, 1885 (Laws Mont.) declaring that all of a defined portion of such reservation that may hereafter be segregated and thrown open for settlement shall form part of Yellowstone county, and therefore, so much of said right of way as is embraced within such defined portions of the reservation is properly taxable in Yellowstone county.

Appeal from Seventh Judicial District, Custer County.

APPLICATION for writ of *mandamus*. The writ was denied by MILBURN, J. Affirmed.

Charles H. Loud and Strevell & Porter, for Appellant.

R. T. Allen and E. N. Harwood, for Intervenor.

PEMBERTON, C. J.—This is an application for a writ of *mandamus* to require the state board of equalization to apportion 47.09 miles of the Bighorn Southern railroad to the County of Custer for the purposes of taxation, which said portion of the road was heretofore apportioned to the county of Yellowstone by the state board of equalization. Upon relator's filing its application with the district court an alternative writ of mandate was issued. The state board of equalization made its return, and, after denying the allegations in relator's application, alleges that by the terms of an act of the legislature of Montana amending an act creating the county of Yellowstone, approved March 5, 1885, it was declared that all that portion of the Crow Indian reservation lying between the Wyoming line and the Yellowstone river and west of the Bighorn river in Montana territory that may hereafter be segregated and thrown open for settlement shall form a part of Yellowstone county. After the return of the state board of equalization was made, Yellowstone county filed its petition of intervention in the case, claiming that the portion of the railroad in dispute was properly apportioned to Yellowstone county for taxation purposes by the state board of equalization. Upon a final hearing of the case the court dismissed the application of the relator, and rendered judgment against it for costs. From this judgment the relator appeals.

By an act of congress approved February 12, 1889, the right of way through the Crow reservation was granted to the Bighorn Southern Railroad company. This act was amended by an act approved March 1, 1893. By the act of the legislature set out in the answer of the state board of equalization that portion of the railroad in controversy became a part of

Yellowstone county, for the reason that it is a part of the Crow reservation which was segregated by the act of congress above referred to, and thrown open to settlement after the passage of the act of the legislature of Montana on March 5, 1885.

It seems from the record that there are something over 100 miles of the Bighorn Southern railroad in the Crow reservation, that part in dispute being west of the Bighorn river. The state board of equalization apportioned all that part of the road east of the Bighorn river to Custer county, and that part in dispute, which lies west of the Bighorn river, to Yellowstone county, under the authority of the act of the legislature of Montana of March 5, 1885, above referred to, which provided that all that part of the Crow reservation lying west of the Bighorn river which should be segregated and thrown open to settlement after the passage of said act should be a part of Yellowstone county.

The relator contends that, while the part of the railroad's right of way was segregated by the act of congress above cited, still that it was not thrown open to settlement in contemplation of law, and for that reason did not become part of Yellowstone county, and could not be properly apportioned to Yellowstone county for the purposes of taxation.

We think the right of way of said road was thrown open for the purposes of settlement by the act of congress above referred to. It ceased to be a part of the Indian reservation, and became occupied and subject to settlement for all the purposes of constructing and operating the railroad. We do not think that it was necessary that it should become subject to settlement under the pre-emption and homestead laws before it could be said for the purposes of this controversy to have been segregated and thrown open to settlement. *Commissioners of Yellowstone County v. Northern Pacific R. Co.*, 10 Mont. 414, is very similar to, and we think an authority in point in, the case at bar. In that case this court held that the right of way of the Northern Pacific Railroad company across the Indian reservation was taxable in Custer county, because

the right of way had been granted by congress prior to the act of the legislature of Montana approved March 5, 1885. Evidently, in that case, if the right of way had been acquired subsequent to March 5, 1885, the holding of the court would have been in favor of Yellowstone county. In the case at bar the right of way of the Bighorn Southern railroad was granted subsequent to the act of the legislature of Montana approved March 5, 1885, and consequently became a part of Yellowstone county, and as such was taxable therein.

We are of opinion that the state board of equalization properly apportioned that part of the railroad in dispute to Yellowstone county, and that there was no error in the lower court so holding. The judgment appealed from is affirmed.

Affirmed.

DE WITT and HUNT, JJ., concur.

OLSEN ET AL., RESPONDENTS, v. THE PORT HURON
LIVE STOCK ASSOCIATION, APPELLANT.

[Submitted June 18, 1896. Decided June 22, 1896.]

CONTRACTS—Construction—Sale of ewe sheep.—Where a contract for the sale of ewe sheep recited that the sheep were to be in "healthy condition" at the time of delivery, the fact that the vender, prior to delivery, may have negligently permitted a number of the ewes to be bred, whereby they dropped their lambs at an unusual and inclement season of the year, to the loss of the vendee, does not constitute a breach of the contract, in the absence of evidence that the words had a local or peculiar signification by which they were understood as a warranty that the ewes were not to be pregnant at the time of delivery.

Appeal from Tenth Judicial District, Choteau County.

CONTRACT. The cause was tried before DU BOSE, J. Plaintiff had judgment below. Affirmed.

Statement of the case by the justice delivering the opinion.

Plaintiffs and respondents sue the defendant, the Port Huron Live Stock Association, a corporation, to recover \$792.17 and

interest and attorney's fees, and for a decree foreclosing a certain chattel mortgage executed by Lewis Wilson, the president of the defendant company, to the plaintiffs, to secure a promissory note made by the defendant to the plaintiffs on October 10, 1893, for said sum of \$792.17, due twelve months after date. The mortgage was the usual chattel mortgage, and embraced 825 head of sheep in Choteau county.

The defendant denied the alleged debt, or any debt, and denied that the mortgage was given to secure the debt evidenced by the promissory note heretofore referred to, and averred that the note and mortgage were given in consideration of the covenants and agreements on the part of the plaintiffs contained in a certain contract between B. G. Olson on the part of plaintiffs and the defendant whereby it was agreed by Olson to extend the balance due on the note heretofore referred to for twelve months after date on a new note to be made after the said Lewis Wilson, for the defendant, should pay to the Northwestern National Bank the sum of \$800, then due on the present note. This contract also contained this provision: "I do also hereby agree to submit to arbitration a claim Lewis Wilson has against me for damages for lambs coming or dropping last winter from sheep sold by me to him, for which said note was given; and to pay such reasonable damages, if the arbitrators so decide, and costs of said arbitration if case is decided against me. The arbitrators to be W. Meade Fletcher on the part of B. G. Olson, and Donovan & Lyter for Lewis Wilson,"—dated October 10, 1893, and signed by Olson and Wilson.

The answer avers that the defendant has demanded the performance of the covenants and agreements, but plaintiffs have refused to keep and perform the same. For further defense and counterclaim the defendant alleged that in August, 1892, plaintiffs sold to defendant 850 head of ewe sheep, for which it agreed to pay at the rate of \$3.50 per head; that at plaintiffs' request the defendant allowed the ewes to remain in plaintiffs' possession until the lambs should be old enough to wean, plaintiffs agreeing to take proper care of said sheep;

that at the time of making said purchase the sheep were represented to be in good condition, and nothing indicated that they were not in such condition, and defendant, relying on such representation, agreed to pay for said sheep the highest price then ruling; that on October 10, 1892, plaintiffs delivered the sheep to the defendant, and the defendant paid part of the purchase price in cash, and gave its note for the balance, payable one year from date, but that during the time between the purchase and sale of said sheep as aforesaid and the delivery to the defendant, and while the sheep were in plaintiffs' possession, plaintiffs negligently permitted the ewe sheep to mix with the male sheep, whereby a large number of said ewes became and were with lamb at the time of said delivery. of which fact the defendant was unaware; that by reason of said negligence many ewes dropped their lambs between January 7, 1893, and March 1, 1893; that by reason of plaintiffs' negligence in permitting the males to have access to the ewes, and the consequent breeding of the sheep during the winter season, the defendant lost 218 head of ewes, worth \$763, and 250 lambs, worth \$375; that on October 10, 1893, there was due by defendant to plaintiffs, for the balance of the purchase price of said sheep, the sum of \$1,592.17, which sum the defendant refused to pay unless plaintiffs would allow reasonable damages for their negligence; that thereupon plaintiffs agreed to submit the controversy to arbitration, as evidenced by the contract heretofore referred to; that in consideration of the covenants and agreements of said contract defendant paid to plaintiffs the sum of \$800 in money, and made the mortgage mentioned in the complaint, which said principal sum mentioned in said note and mortgage was the balance of the purchase price of said sheep without deducting anything for damages, it being understood and agreed that the amount of damages was to be settled for before said note and mortgage became due. The defendant asked for judgment for \$335.83.

The replication denied all the averments of the answer stating new matter, and pleaded the lack of consideration for the alleged agreement in relation to arbitration, and alleged that

the only consideration for the note and mortgage was the indebtedness of the defendant to plaintiffs of \$792.17, as alleged in the complaint. The replication also avers that the agreement to arbitrate was never executed, nor did the arbitrators ever accept or in any way act in the premises, and that on March 15, 1894, plaintiff B. G. Olson notified defendant that he revoked the said alleged agreement to arbitrate, and did not intend to submit any controversy to arbitrators. It is also denied especially, among other things, that plaintiffs ever at the time of the purchase of the sheep made any representations or agreements in relation to the sheep, except the agreement made part of the replication. It is then alleged that on September 19, 1892, plaintiffs and defendant entered into a certain contract, whereby the defendant agreed to purchase, and plaintiffs agreed to sell and deliver, 850 ewes, more or less, not later than November-1, 1892. This agreement, after citing the consideration of \$3.50 per head, recited that the sheep would be delivered not later than November 1, 1892, "said sheep to be in healthy condition at time of delivery." In consideration of the covenants in that agreement the defendant paid to the plaintiffs \$402.50, and agreed to pay \$1,097.50 at time of delivery of the sheep, and the balance was to be secured by mortgage on said sheep.

The plaintiffs denied all negligence pleaded, and all loss by reason of any negligence on their part.

A jury was sworn to try the case. The defendant admitted the due execution of the mortgage described in the complaint, and plaintiffs rested. Thereupon the defendant sought to introduce in evidence the contract in relation to settling the dispute between the parties by arbitration. The plaintiffs objected, and the contract was excluded. The defendant next tried to introduce evidence to explain the custom of sheep men in relation to breeding their ewes. This was all objected to, and the objection sustained. Defendant then tried to prove that if the ewes dropped their lambs in January and February they would be apt to die from exposure to the cold. All this testimony was excluded, whereupon the court advised the jury

that under the contract for the sale of the sheep it had not been shown that there were any unhealthy sheep delivered, and that the defendant could not recover upon a counterclaim in the case. The jury were discharged, and judgment ordered for plaintiffs. Defendant appeals from the judgment.

Donnelly & Knox, for Appellant.

Ransom Cooper, for Respondents.

HUNT, J.—The real question in this case, and the one treated by the briefs as decisive, is whether plaintiffs are liable to the defendant on that clause in the contract of sale of the sheep which provided that the sheep sold were to be “in healthy condition at time of delivery.” The solution of the question involves this simple inquiry: Are ewes in an unhealthy condition because pregnant in October and the three months following? The district court decided they were not, and we affirm that view.

When the plaintiffs and defendant agreed that the sheep to be sold were to be in healthy condition at time of delivery, they meant healthy as opposed to diseased condition,—that is, that the sheep were to be free from disease; such, for instance, as scab or physical ailments or impoverishment not incidental to a band of sheep in normal and sound state of health. We do not believe that because it happened that certain of the ewes were pregnant at a particular season of the year such condition was by itself an unhealthy one. Generally speaking, fecundity in animals whose value is greatly enhanced by capabilities of an annual increase by offspring would be evidence of good health, as doubtless sterility would be evidence of ill health. That the young, if not prematurely born, are dropped at any particular season, has no relation to the condition of health of the ewes which drop them. The opportunity for conception may have been unwisely, or even negligently, given, but the fact of conception is not evidence of ill health or disease. Suppose the band of sheep had been delivered by the defendant in April, and it was agreed that the sheep were

in healthy condition, but suppose that in April or May, when by common knowledge the lambing season prevails in Montana, the ewes did not drop their lambs, but did drop them in July thereafter; could the purchasers of the band sustain an action against the vendors upon the ground that the sheep were not healthy because the ewes were not pregnant at the particular season in which they generally are supposed to be in this latitude and climate? Manifestly not. It would be said at once that the condition of the sheep had nothing whatsoever to do with the health of the ewes.

The district court therefore, correctly excluded the evidence of the witnesses by whom it was proposed to show that lambing in January and February would be dangerous to the lives of the ewes and lambs. The words "healthy condition," used in the contract, required no extraneous explanation. They were presumably used in their primary and general acceptance. Moreover, there was no offer by defendant to prove that they had a local, technical, or otherwise peculiar signification, or that they were so used and understood in this particular instance. The court cannot go beyond the fair import of the words in the contract, nor can we add any new warranty not contemplated by the parties to the agreement.

The defendant did not offer any evidence to sustain its averments of negligence on the part of the plaintiff, nor did it rely upon or prove false representations or deceit or misrepresentations. The controversy hinged upon the construction of the words of the contract itself. The suggestion of the appellant that the arbitration agreement entered into between the parties tends to place a construction upon the contract favorable to the appellant is not sound. We regard this agreement as one of extension containing a recognition of the fact that differences had arisen in relation to the claim of appellant under the terms of the original contract, and that for the purpose of settling such differences the parties agreed to submit the matter of any damages, if any there were, to arbitration. The arbitration was not had. This action is to determine just what was to have been left to arbitration. Appellant was not

injured by failure to arbitrate, and makes no 'claim that it was.

There is nothing in the language of the agreement which would warrant the court in saying that the parties understood the words "healthy condition" to mean that the ewes were not to be pregnant at the time they were delivered.

We find none of the assignments well taken. Judgment affirmed.

Affirmed.

PEMBERTON, C. J., and DE WITT, J., concur.

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SANFORD, RESPONDENT, v. GATES, ET AL., APPELLANTS.

[Submitted June 10, 1896. Decided June 22, 1896.]

REPLEVIN—Sufficiency of defense—Fraud and deceit.—It is a good defense to an action for the possession of personal property, which had been delivered to defendants under a written contract whereby the title remained in the vendor until all the installments of the purchase price were paid, that the real contract between the parties was that defendants should pay the amount remaining due from one to whom the property had been originally delivered and who had transferred his interest therein to defendants; that it was fraudulently represented by such party and plaintiff that the sum of \$649 remained due upon the purchase price, whereas but \$449 was due; that defendants executed said contract believing the representations to be true, and being without means of knowledge to the contrary, and that the sum of \$449 had been paid in full whereby defendants were entitled to the property.

CONTRACTS—Rights of assignee—Fraud.—The assignee of a contract may set up fraud in the contract as executed, and rely upon the real contract.

Appeal from First Judicial District, Lewis and Clarke County.

REPLEVIN. Judgment was rendered for the plaintiff below. by BUCK, J.

Statement of the case by the justice delivering the opinion.

Defendants appeal from a judgment rendered in favor of plaintiff upon the sustaining of plaintiff's demurrer to the answer. The action is replevin.

Plaintiff sets up in his complaint that he is the owner and entitled to the possession of personal property, to wit, certain hotel furniture, of the value of \$649.06, and that the same is unlawfully withheld by the defendants, and that his title is based upon a written contract, which he pleads in full; that the furniture was delivered to the defendant Gates, Townsend & Co., under said contract; and that the interest of said company was afterwards assigned to the defendant Florence K. Gates. The contract was in the nature of a lease, by which the possession was delivered to the defendant, the title remaining in the plaintiff until the property was fully paid for, the defendant paying for it in monthly installments, which were called "rent;" the title to pass to the defendant when all of the said rent was paid. The defendant had paid all of the installments except the last \$200, with \$5 interest on the same. The defendant has not paid this last \$200, or interest thereon. An installment of \$50 of this amount had matured, and, under the terms of the contract, plaintiff is entitled to possession of the goods. These allegations all appear in the complaint.

The defendants' answer sets up what they claim to be an equitable defense. They allege: That, at and before the execution of the contract referred to, one Rohrbaugh was leasing from the defendant company the Grandon Hotel; and that Rohrbaugh had in his possession, under some agreement with the plaintiff, the property mentioned in the complaint, said property being used in the hotel as part of the furniture. When the agreement mentioned in the complaint was executed, Rohrbaugh was indebted to the company in the sum of \$1,800, and was insolvent, and unable to pay the company except by transferring to it the interest which he had in the said personal property. There was at that time due from said Rohrbaugh to the plaintiff, on said personal property, the sum of \$449.06; and plaintiff well knew of the indebtedness of Rohrbaugh to the company and also knew of Rohrbaugh's insolvency. That, in fact, the defendant company agreed to execute to plaintiff a contract to pay plaintiff whatever amount was due from Rohrbaugh to plaintiff on the furniture, and thus become the owner

of the property. That plaintiff and Rohrbaugh conspired together to defraud the defendant company, and, in pursuance to said conspiracy, fraudulently represented to the defendant company that there was due from Rohrbaugh to plaintiff, upon such property, the sum of \$649.06, instead of the real sum of \$449.06, which latter sum was the amount which it was in fact agreed that the defendant company should pay to the plaintiff in order to obtain title to the property. That the defendant company relied upon said fraudulent representations, and had no knowledge or means of knowledge or information to the contrary, and believed said representations to be true, and executed the contract to pay \$649.06, which contract was so obtained by the said fraud and deceit; and that the said contract is null and void. That the defendants, before the commencement of the action, had paid in full the sum of \$449.06, which was the whole amount due from Rohrbaugh upon the property; and that, by reason of said payment, they are entitled to the possession of the property.

To this answer a demurrer was filed, upon two grounds, viz: First, that the answer does not state facts sufficient to constitute a defense to the plaintiff's cause of action; and, second, that Rohrbaugh is a necessary party to any bill or complaint seeking relief from the acts set out in the pretended equitable defense in the answer. This demurrer was sustained, and judgment entered for plaintiff. The defendants appeal.

Toole & Wallace, for Appellants.

T. J. Walsh, for Respondent.

DE WITT, J.—The record does not disclose upon which ground the demurrer was sustained. Appellants argue that it must be presumed that it was sustained upon the formal ground, to-wit, the second one set out in the demurrer, and cite *Kleinschmidt v. Binzel*, 14 Mont. 31. But this is not important, for the second ground of the demurrer to the answer is not one allowed by the Code. (Code Civil Procedure, 1887, §§ 92–94.)

We therefore proceed to the question of whether the answer sets up facts sufficient to constitute a defense. The argument of the respondent has taken a wider range than we think the pleadings justify. Indeed, we are of opinion that the position of the appellants is a very simple one, and is wholly correct. Respondent's counsel argues with his accustomed zeal that the matter set up in the answer cannot be a counterclaim to an action of replevin. But we think that such matter is a defense. It is called a "defense," and set up as such in the answer. The complaint alleges ownership and right of possession of personal property. If the answer sets up facts which deny the ownership and right of possession, the defense is good. We are of opinion that it does set up such facts. In our view, a plain statement of the defense is simply this : The plaintiff relied upon a written contract to establish his right of possession to the property. The defendants allege, very much in detail, that the contract was obtained from them by fraud and deceit sufficient to avoid its obligation. Then they set up in their answer that the real contract between plaintiff and defendants was wholly different from that pleaded in the complaint; the contract in the complaint being for the payment of \$649.06 in order to give the defendants title to the property, whereas the real contract between plaintiff and defendants was, in fact, that defendants should pay \$449.06, which payment was to give them full title to the property, and which payment they pleaded had been fully made. If these facts are true,—and, on demurrer, they are taken to be true,—the defendants have fully completed the actual contract between the company and plaintiff; and, having fully performed the actual contract, the defendant company is entitled to the property, and the plaintiff is not.

The original contractor with the plaintiff was Gates, Townsend & Co. The company has assigned its rights to the other defendant, Florence K. Gates. We know of no reason why the assignee, Florence K. Gates, may not set up the fraud in the original contract, and rely upon the real contract for the rights which it appears were assigned to her.

The judgment is reversed, and the case remanded, with instructions to overrule the demurrer.

Reversed.

HUNT, J., concurs. PEMBERTON, C. J., absent.

CANNON, ADMINISTRATOR, RESPONDENT, v. LEWIS, APPELLANT.

[Submitted June 19, 1896. Decided June 29, 1896.]

NEGLIGENCE—Findings—Conflict in evidence.—Where the evidence in an action for personal injuries amply sustains the finding of the jury that there was no railing in front of an excavated lot at the point where plaintiff fell into the cellar, the finding will not be disturbed on appeal because of a conflict in the evidence.

SAME—Contributory negligence—Knowledge of danger by plaintiff.—Knowledge by the plaintiff of an excavation adjoining a sidewalk, upon which he was walking on a dark night, and into which he fell, and failure to avoid it by walking on the outside of the sidewalk, was not contributory negligence where there was no defect in the sidewalk at that point which made it dangerous to walk thereon.

SAME—Same.—The rule that a person approaching a known place of danger must be vigilant to avoid it, must be considered in connection with the further one that a traveler upon a city highway is, as a general rule, justified in assuming it to be safe.

SAME—Instructions.—Instructions should be considered together and where the law of contributory negligence is fully laid before the jury in several instructions, error cannot be predicated of a failure to incorporate it as a limitation to one particular instruction complained of.

SAME—Same.—An objection that the court assumed certain facts as true in an instruction laying down a rule for the estimate of damages, is not well founded where the instruction was given wholly upon the hypothesis of the evidence showing certain facts before any damages could be awarded.

SAME—Defendant's knowledge of condition of property.—That defendant did not know that a part of the rail in front of the excavation had been removed prior to the accident cannot avail him when he was upon the premises at least once a week and passed there every day, and his negligence was therefore a question for the jury.

APPEAL—Harmless error.—Error, if any, in sustaining an objection to a question is harmless where the witness had previously answered substantially the same question without objection.

Appeal from Second Judicial District, Silver Bow County.

ACTION for damages for personal injuries. Defendant's motion for a new trial was denied by McHATTON, J. Affirmed.

Statement of the case by the justice delivering the opinion.

Action to recover damages for personal injuries sustained

18	402
125	397
18	402
136	481
36	581

by plaintiff John O'Donnell (now deceased), by reason of his falling into a cellar belonging to the defendant, and abutting a sidewalk in Butte.

The complaint alleges that at the time of the accident there was no railing, guard, protection, light or signal of any kind, at said cellar, or near where the same abutted on said sidewalk, and that defendant knew this fact. The answer denied the alleged negligence, and pleaded contributory negligence, by reason of the intoxication and carelessness of the plaintiff. The plaintiff, by replication, denied the new matter in the answer.

The case was tried to a jury, and a verdict of \$1,000 damages, and judgment thereon, were rendered for the plaintiff. The defendant moved for a new trial. This motion was overruled, and from the order overruling said motion, and from the judgment, the defendant appeals.

C. P. Drennan and Lewis Penwell, for Appellant.

The defendant's motion for a nonsuit should have been sustained. The plaintiff in his own testimony admitted that he had often passed along the sidewalk near the cellar in question; that he considered it a very dangerous place; that he could easily have avoided it by taking another route, or by exercising ordinary care and attention; that he was not paying any attention to the cellar, although he knew it to be there and considered it dangerous, but deliberately incurred the risk. Such conduct was clearly negligence contributing to the injury. (9 Am. & Eng. Ency. of Law, page 396 and 397, note 1, and cases cited; Elliott on Roads and Streets, 642, 643; Sherman & Redfield on Negligence (4th Ed.) I., page 135, § 90, and page 152, § 96; *Wilson v. Charlestown*, 8 Allen 137, 85 Am. Dec. 693; Beach on Contributory Negligence, § 9; *Mount Vernon v. Dusonchett*, 2 Ind. 586, 54 Am. Dec. 467; *Whitaker v. City of Helena*, 14 Mont. 124; *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520.) There was no evidence of any knowledge of, or notice to defendant, of the removal of the barrier guarding the excavation. Such knowledge of de-

fendant, or notice to him, was necessary to render him liable. (*Daniels v. Potter*, 4 Car. & P. 262; *Doherty v. Inhabitants of Waltham*, 4 Gray, 596; *Aylesworth v. C. R. I. & P. R. Co.*, 30 Iowa 459; *Klatt v. City of Milwaukee*, 53 Wis. 196, 40 Am. Rep. 759.)

HUNT, J.—The evidence of the plaintiff tended to show the following condition of affairs: John O'Donnell, the plaintiff, a man of 60 years of age, lived a very short distance from an excavated cellar belonging to the defendant, Lewis. Lewis had excavated the cellar and built the foundation of a building on a lot near the plaintiff's house. The front of the cellar was a little lower than the sidewalk. The sidewalk was about 12 feet wide, and appears to have been in good order, and in daily use. About 1 o'clock on the morning of the 29th of August, 1892, the plaintiff was returning to his home. It was very dark in the vicinity of the lot where the excavation was. The plaintiff, while walking along on the side of the walk next to the excavation, stumbled, and fell head foremost into the cellar. The plaintiff's evidence further tends to show that there was nothing at all along that portion of the lot where plaintiff fell in the nature of a fence or guard to protect him against falling, although there may have been a rail about two feet high along another and lower portion of the lot. Plaintiff himself says that when he stumbled there was no rail to prevent his falling into the cellar. He fell a distance of about twelve feet, and broke his thigh. He was in bed for six or eight weeks, and at the time of the trial wore a thick shoe, the injured leg being shorter than the other. The injury was permanent, and interfered with the capacity of the plaintiff to perform manual labor. Plaintiff admitted that he knew the excavation was there and was dangerous, but had paid no particular attention to the place. According to the testimony of several of plaintiff's witnesses, there had not been any railing at all in front of the place where plaintiff fell for several weeks before the accident; one witness saying that, between July 24th and the time of the accident, there was no fence in front of the excavation.

The testimony of the defendant was to the effect that there was a fence all along the front of the excavated lot; that this fence was about two feet above the line of the sidewalk, and was secure and in position upon the night of the accident. The defendant himself said that he saw the fence about a week before the accident, and that it was then up, but he did not notice if it was up just before the accident. He also said that after the accident he found one of the boards broken in two, one part hanging to the window frame to which it was nailed on top; that he passed the property every day; and that he put the fence up originally, believing that the excavation was a dangerous place. The fence consisted of inch boards nailed upon the window frames which extended from the cellar wall up above the sidewalk. The north board was about twelve feet long and an inch thick. This was the one which defendant says he found broken the morning after the accident.

From the foregoing brief statement of the testimony, it will be seen that there was a direct conflict upon the question whether or not there was any railing in front of the excavated lot at the point where the plaintiff fell into the cellar. This question of fact was fairly submitted to the jury, and their finding to the effect that there was no railing is amply sustained by the evidence, and will not be disturbed by the court.

The argument of the appellant is that the district court ought to have nonsuited plaintiff because it appeared in the evidence that the plaintiff knew of the excavation, and could have avoided it by taking another route, by walking on the outside of the sidewalk, and that, therefore, he was negligent, and contributed to his own injury. If this were a case where walking upon the sidewalk in front of the excavation had been accompanied with any danger to the plaintiff, by reason of any defect in the sidewalk, and the plaintiff knew of such defect, yet deliberately incurred the risk and was hurt, then the argument of contributory negligence might be reasonable. But under the facts at bar there was nothing the matter with the sidewalk, and the plaintiff had a lawful right to deliberately

walk upon it. Ordinarily he was incurring no risk of falling in the cellar in doing so, and, if he had not stumbled, probably he would not have been hurt. It can be said, therefore, that primarily it was the accident of stumbling in the darkness which forced plaintiff towards the excavation; but it was none the less the failure of the defendant to have erected a fence or railing in front of the excavation which caused him to fall into the cellar, and this led to the injury to the plaintiff. The case is therefore brought within the general doctrine sustained in *Lundeen v. Electric Light Co.*, 17 Mont. 32—that the circumstance that the injury was partly the result of a defect in the construction, and partly resulted from an accident unconnected with such faulty construction, and without any fault on plaintiff's part, and while he was in the exercise of ordinary care, would not prevent a recovery. (Angell & D. on Highways, § 295; *Bassett v. City of St. Joseph*, 53 Mo. 290; *Manderschid v. City of Dubuque*, 25 Iowa 108; *City of Lacon v. Page*, 48 Ill. 499; *City of Joliet v. Verley*, 35 Ill. 58.)

The circumstances created a duty on the defendant to fence, or otherwise guard, the cellar for the protection of persons situated as O'Donnell was,—pedestrians walking, without negligence on their part, along public sidewalks of the city. (Sherman & Redfield on Negligence, § 715; Beach on Contributory Negligence, § 253.)

We recognize the rule that, when a person approaches a known and visible place of danger, he must be vigilant to apprehend and avoid the danger; but this rule must be considered with the further one that a man traveling upon a city highway is, as a general rule, justified in assuming it to be safe. (*McGuire v. Spence*, 91 N. Y. 303.)

This same argument of familiarity with the street, and knowledge of the excavation, was advanced in *Weed v. Village of Ballston*, 76 N. Y. 329. In that case an excavation was made in a street; the excavation was not properly guarded. Plaintiff, one dark night, drove into the excavation, and was injured. Upon the defense of contributory negligence, because of the knowledge of the existence of the excavation, the

court said: "But we think the question of plaintiff's negligence was one of fact, and that the finding of the referee thereon cannot be disturbed. In general, a person traveling upon a highway is justified in assuming that it is safe. The plaintiff, although he had known of the excavation, might not remember its exact location, or the fact might have been forgotten. * * * The plaintiff was driving on a slow trot, and the fact that he did not keep in the middle of the street was not negligence, if at the time he was not conscious of the impending danger.

In *Bond v. Smith*, 44 Hun. 219, the plaintiff's intestate was killed by falling into an area between the rear wall of the defendant's premises and an alley in the city of Buffalo. The defendant moved for a nonsuit, because the plaintiff did not show that her intestate was free from contributory negligence. It appeared in that case that the deceased was familiar with the area in the rear of the defendant's building. The court held that "a person traveling upon a highway is, as a general rule, justified in assuming that it is safe, and where he is injured in consequence of a defect therein, the fact that he had previous knowledge of the existence of the defect does not *per se* establish negligence on his part." The court further say that he could recover even if he knew of the area in the alley. "Its precise location may not have been easily discernable in the darkness, and, although exercising ordinary caution, his foot may have hit against the wall surrounding the area upon the line of the alley, causing him to stumble and fall."

We therefore think that the question of contributory negligence in this respect was one of fact, for the jury to pass upon under proper instructions, and that their finding is sustained by the evidence in the case.

Error is assigned because the court gave a general instruction to the effect that the owner of property adjoining a highway is bound to use his property so as to do no harm to persons lawfully traveling upon the highway, and if he digs a pit near a sidewalk, so that one, in passing along, falls in, and

is thereby injured, he is liable for damages to the person injured, provided said pit or cellar was not properly guarded; and such pit-falls or cellars, if contiguous to the public street, are nuisances of which the owner of the land is liable. The objection urged to this instruction is that it eliminated the element of contributory negligence. But the jury were clearly charged, by other instructions, that, if they found from the evidence that the accident was attributable to the want of ordinary care on the part of the plaintiff, he could not recover in the suit, and that any negligence on the part of the plaintiff which directly contributed to the injury would defeat a recovery. They were also told that the first inquiry to be made by them was whether plaintiff was guilty of any negligence, or want of ordinary care or prudence, on the occasion of the accident, and if he was guilty of negligence he could not recover, and they need not go any further in their investigations. The instructions should be considered together. All of the qualifications could not well be incorporated in one instruction, and where the law of contributory negligence was fully laid before the jury, as it was, they could not have been misled by the omission to incorporate it as a limitation to the particular instruction complained of by the appellant. See *Hamilton v. Railroad Co.*, 17 Mont. 334, and *Johnson v. Mining Co.*, 16 Mont. 164.

The appellant also complains of an instruction which laid down a rule for the estimate of damages which plaintiff might recover, if entitled to recover at all. Appellant urges that the court assumed certain facts as true in the charge. This objection is not well founded, for the instruction begins by telling the jury that if they believe *from the evidence* that the plaintiff was injured in the manner and form alleged in the complaint, and through the carelessness and negligence of the defendant, without contributory negligence on his part, then they should estimate the damages to which they thought he was entitled, etc. The whole instruction was predicated upon the hypothesis of the evidence showing certain facts, before any damages could be awarded.

An instruction quite like the one given in this case was discussed in *Hamilton v. Railroad Co.*, *supra*, where it was held that such a charge was unobjectionable, because the jury were advised to take into consideration all the testimony as to the nature of the injury, if any, etc. .

Appellant also argues that he did not have any knowledge of the fact that a part of the rail in front of the excavation was removed prior to the time of the accident. This cannot avail the defendant, because he admits by his testimony that he was upon the premises at least once a week, and passed there every day. Whether he was negligent, therefore, was for the jury to pass upon.

The next error relied upon goes to the objection made by the plaintiff to the following question asked by the defendant's counsel: "Couldn't you have walked on the outside of the walk, so as to avoid this?" The witness answered this question by saying that "he could have walked on the outside, of course." Plaintiff's counsel objected to the question after the response was made, saying that "a pedestrian does not have to walk on the outside." The court sustained the objection, and defendant excepted. If we concede that the court erred, the ruling was not prejudicial to the appellant, because, previous to the objection to this question, and on cross-examination, plaintiff, without objection, had answered substantially the same question, by saying that he did not know why he did not walk on the outside of the sidewalk; that he was walking along, and did not suppose he would fall into the cellar. No motion was made to strike this testimony out. (*Ruff v. Rader*, 2 Mont. 211.)

The defense of contributory negligence, on the ground of plaintiff's intoxication, was submitted to the jury, and disregarded by their verdict.

Upon the whole case, we find no error. Judgment affirmed.

Affirmed.

DE WITT, J., concurs. PEMBERTON, C. J., not sitting.

WAITE, RESPONDENT, VINSON ET AL., APPELLANTS.

[Submitted June 22, 1896. Decided June 29, 1896.]

COSTS—Retaxing—Printing brief.—On motion to retax costs on remittitur from this court, an item for printing briefs, otherwise allowable, was properly stricken out where it appeared that this expense had been paid for in another item.

SAME—Same—Statement on appeal.—An item in a cost bill reading: "To statement on appeal—\$100," was properly disallowed where it appeared that if intended as a charge for transcription, that expense had already been charged for, and if intended as a charge for professional services, was not a taxable item of costs.

SAME—Transcript of evidence—Necessary disbursement.—Under section 494 of the Code of Civil Procedure (1887) allowing the prevailing party his "costs and necessary disbursements," a fee paid the stenographer for a transcript of the evidence to be used in preparing a statement on motion for a new trial is a necessary disbursement.

Appeal from Tenth Judicial District, Fergus County.

PLAINTIFF'S motion to retax costs on return of remittitur was granted by DU BOSE, J. Reversed in part.

Statement of the case by the justice delivering the opinion.

Upon the original trial in the district court, plaintiff had judgment. Defendants appealed. The judgment was reversed. (14 Mont. 405.) Upon the return of the remittitur, defendants filed in the district court their memorandum of costs. Among the items were the following:

"To statement on motion for new trial, and paid to F. W. Mettler, \$75. To statement on appeal, \$100. Printing brief, \$11.10. F. W. Mettler, services in case, preparing judgment, \$3.60."

A motion to retax the costs was made by plaintiff, and these items were disallowed, and the statutory penalty of \$25 imposed. From this order the defendants appeal.

Geo. W. Taylor and C. B. Nolan, for Appellants.

Edward C. Russel, for Respondent.

DE WITT, J.—The \$11.10, for printing brief, was stricken out. This we should be obliged to hold to be error (*Ryan v.*

Maxey, 17 Mont. 164,) were it not that it seems from the cost bill that the printing of the brief had been paid for in another item. There was a charge of \$25 for printing brief. It does not appear that there were two briefs. The court allowed the \$25 item, and we must presume that the court found that there was only one brief, and that the larger charge included the smaller, and therefore the court struck out the smaller charge. This ruling must be sustained.

The charge of \$3.60, for preparing judgment, is wholly unauthorized, and this is conceded by the appellants. This ruling must be affirmed.

We are of opinion that we must sustain the action of the lower court in striking out the item of \$100, for the reason that there is no sufficient showing in the cost bill as filed for us to intelligently determine that the court committed any error in disallowing the item. It reads: "To statement on appeal, \$100." It does not appear whether this is for transcribing the statement on appeal to the supreme court, or whether it is for literary and legal labors of counsel in preparing the statement. If it is intended to be a charge for the transcription, we find that the transcript is already charged for in another item of \$40, which was allowed by the court; and if it is intended to be a charge for professional labor of counsel in preparing the statement, it is sufficient to say that charges for attorney's fees are not allowed generally to be taxed as costs in this jurisdiction. We shall therefore not disturb the action of the district court in striking out this item.

The charge of \$75 for statement on motion for a new trial, appears, by the affidavit of the stenographer (which was used on the motion to retax costs,) to have been a sum paid the stenographer for a transcript of the evidence to be used in preparing the statement on motion for a new trial. There is considerable conflict of decision as to whether such expenses are chargeable as costs, but the decisions depend largely upon statutes of the different states. Our statute (section 494, Code Civil Procedure, 1887,) gives to the prevailing party "his

costs and necessary disbursements." The statute does not enumerate them in detail, but simply makes this general provision. The practice of all our courts is to try cases with the aid of stenographic reporters. If the defeated party wishes to move for a new trial upon a statement of the case, he must in some way procure a copy of the evidence, in order to construct his statement. He must obtain this evidence from the reporter, or he must make it out from memory, or he must take it down as the case is being tried. To require him to take it down as the case is being tried is, under modern practice, wholly impracticable. The court would not wait for him to write it out in longhand; and, furthermore, during the trial of the case he would not know that he would require it. The necessity for the evidence would arise only after he had been defeated on the trial. Again, to require counsel to produce a statement of the evidence from his own memory is also impracticable. One object of having a stenographer is to attain accuracy. If counsel are to be relegated to the old system of writing out a statement from memory, the stenographer may as well be dismissed from the court. Furthermore, the judge, in settling the statement, would be much more likely to settle it correctly if he had a stenographer's transcript than he would if he were obliged to rely upon the conflict of memory between the respective counsel and between the counsel and the judge. We are certainly of opinion that the expense of the transcript of the testimony in preparing the motion for a new trial is a necessary disbursement. We are informed that it is so held in the practice in the two largest districts of the state,—districts which furnish much more than a majority of all the business of this court. It is also so provided in the new Code of Civil Procedure of 1895 (§ 1866,) so that the matter is settled by statute for the future. For these reasons we shall hold that the charge of \$75 was properly taxed as costs, and that the court erred in striking out that item.

The order of the district court will therefore be affirmed in striking out the items of \$11.10, \$3.60, and \$100. and will be

reversed as to the disallowing of the item of \$75. It will necessarily be affirmed as to the docket fee of \$25, as a penalty for wrongfully taxing costs. (*First Nat. Bank v. Neill*, 13 Mont. 377; *First Nat. Bank v. Boyce*, 15 Mont. 162.)

The case is remanded, with direction to enter judgment accordingly. The costs of this appeal will be divided equally between the parties, except that the appellant shall pay all of the costs of inserting in this transcript the opinion of this court upon the appeal of the original case. To insert such opinion was a wholly unnecessary incumbrance of the record.

HUNT, J. concurs. PEMBERTON, C. J., not sitting.

THE PALATINE INSURANCE COMPANY (LTD.), RESPONDENT, v. CRITTENDEN ET AL., APPELLANTS.

[Submitted June 23, 1896. Decided June 29, 1896.]

SURETY—Liability on agent's bond—Duty of obligee.—Failure of the obligee of an agent's bond to inform a surety, at the time of the execution of the bond, that the agent was then indebted to him in a former agency, does not discharge the surety, where no representations were made by the obligee as to the trustworthiness of the agent, or inquiry by the surety as to the agent's former relations with his principal.

FOREIGN INSURANCE COMPANIES.—The right of a foreign insurance company to recover on a contract in this state is not affected by failure to file in the office of the secretary of state and the county recorder, the papers designated in chapter 24, Fifth Division, Compiled Statutes, 1887. (*State ex rel. Aachen & Munich Fire Insurance Co. v. Rotvitt*, 17 Mont. 41, affirmed.)

Appeal from Second Judicial District, Silver Bow County.

ACTION on bond. Defendant's motion for a new trial was denied by McHARTON, J. Affirmed.

Statement of the case by the justice delivering the opinion.

On June 4, 1892, the plaintiff, a foreign insurance company, appointed the defendant William J. Crittenden its agent. This agency continued until August 30, 1893, upon which date Crittenden rendered an account to the plaintiff, showing

that he had received \$878.20 as agent, which he had not paid over to the plaintiff. Crittenden had given a bond, with the defendants H. R. Bartlett and Joseph Chauvin as sureties. One of the conditions of the bond was that he should account and pay over to the company all such moneys of the company as he might, from time to time, receive. The plaintiff commenced this action against Crittenden as principal and Bartlett and Chauvin as sureties for the recovery of the amount of money due as aforesaid. Crittenden defaulted, and judgment was entered against him for \$936.70. The action was tried as against the sureties, and judgment rendered for \$475.23 against them. After a motion for a new trial was denied, the defendant Bartlett appealed from this order and from the judgment.

The separate answer of the defendant Bartlett, surety, set up that prior to June 4, 1892, at which date Crittenden was appointed agent for the plaintiff, a firm consisting of Crittenden and one Tucker, under the firm name of Crittenden & Tucker, had been the agents for the plaintiff, and that when Crittenden was appointed agent, on June 4th, Crittenden & Tucker were indebted to the plaintiff in a sum exceeding \$500, and that the defendant Bartlett, when he executed the bond, was not notified of the fact that Crittenden & Tucker were so indebted to the plaintiff.

Upon the trial of the case, the surety Bartlett, desiring to prove that the former indebtedness of Crittenden & Tucker to plaintiff was a fraudulent one, obtained leave to amend his complaint, and inserted the following allegation: "That the said indebtedness from Crittenden & Tucker to plaintiff was fraudulent, and the said Crittenden & Tucker were in default, and were defaulters to plaintiff in said sum, which was long past due; and the said Crittenden & Tucker fraudulently withheld same from plaintiff, of which facts this defendant was not notified, though the plaintiff had an opportunity so to do; that said Crittenden & Tucker had given the plaintiff no bond whatever."

The trial then proceeded, and evidence was introduced show-

ing the fact of the indebtedness of Crittenden & Tucker to the plaintiff. At the close of the testimony, the court, of its own motion, struck out all said testimony, and withdrew the same from the jury. The reason given by the court was that this evidence did not sustain the allegation of Bartlett's answer, or the amendment which he made upon the trial in reference to this indebtedness being fraudulent. The court held that the indebtedness of Crittenden & Tucker was simply a debt to the insurance company which was indulged by the company, and that the mere fact of the indebtedness of Crittenden & Tucker to the company, and the noncommunication of that fact by the company to the sureties at the time of the execution of the bond, would not be a defense to an action on the bond. The court then proceeded to give instructions based upon this construction of the law. It is the action of the court in this respect that is now assigned as error by the appealing defendant, Bartlett.

Forbis & Forbis, for Appellant.

S. De Wolfe, for Respondent.

DE WITT, J.—The statement preceding this opinion gives the point so fully that there seems to be but little to say beyond citing a few of the leading authorities. We are of opinion that the ruling of the lower court upon the law was correct. We find it stated in 2 Brandt on Suretyship, § 422, that: "If the party who takes a bond for the conduct of the principal in an employment knows at the time that the principal is then a defaulter in said employment, and conceals the fact from the surety, such concealment is a fraud upon the surety, and discharges him." The author cites numerous cases upon this point. There are some cases to the contrary, but we are of opinion from a review of the decisions that the text of Brandt quoted states the law correctly.

Appellant relies upon this statement of the law, and contends that the evidence which the court struck out showed that the firm of Crittenden & Tucker were defaulters to the insur-

ance company at the time when the company took the bond from Crittenden and his sureties, and that Crittenden, being a member of that firm, was also a defaulter when the bond was given, and that it was the duty of the insurance company, in taking the bond, to divulge this fact to the sureties. But upon a review of the evidence we are of opinion that the court was correct in holding that the evidence did not show that Crittenden was a defaulter, or that Crittenden's former indebtedness to the company was a fraudulent one, but that it was simply a debt owing by him to the company. Appellant's authorities, and his statement of the law, are therefore inapplicable.

Mr. Bartlett, the defendant, was called as a witness, and he does not pretend to claim that any representations were made to him by the insurance company as to the trustworthiness of Crittenden. He made no inquiry whatever as to Crittenden's former relations to the company, or his former good conduct towards the company in their business.

The point in this case therefore is: Must the party taking a bond divulge to the surety the fact that the agent about to be employed was formerly indebted to said party about to take the bond, when no inquiry was made by the person intending to become a surety? We think that the authorities are to the effect that no such obligation rests upon the obligee of the proposed bond. If such obligation did rest upon the obligee of such bond, the obligee would not be able to determine what facts he should communicate and what facts were immaterial. We find the following in Brandt on Suretyship, § 419: "Where it was agreed between principal and creditor that a guaranty for part of the debt should be surrendered upon a new guaranty being executed, and this fact was not communicated to the party signing the new guaranty, it was held that he was not thereby discharged. The court said that the concealment, in order to discharge the guarantor, must be fraudulent. If it were otherwise, 'it would be indispensably necessary for the bankers to whom the security is to be given to state how the account has been kept, whether the debtor was punctual in his dealings, whether he performed his promises in an

honorable manner; for all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to gain this information, * * * it is quite unnecessary for the creditor to whom the suretyship is given to make any such disclosure.'” The quotation in Brandt is from *North British Ins. Co. v. Lloyd*, 10 Exch. 523.

We also find the following in 2 Brandt, on page 611, note 4: “In *Roper v. Trustees*, 91 Ill. 518, it is held that if a person, knowing another to be utterly insolvent, propose to credit him if he will procure sureties, he is not guilty of fraud by failure to inform the surety of the insolvency of his principal; but *aliter* if he use an artifice to throw the surety off his guard, or deceive him.”

So, in the case at bar, if Crittenden & Tucker had not paid the insurance company, and were unable to pay, it may be said that they were insolvent, and, under the authority of the Illinois case, the company was not obliged to communicate that fact to the surety, when no inquiry was made, and when no artifice was used by any one to deceive the proposed surety. Again, it is said in *Wilmington, etc., R. R. Co. v. Ling*, 18 S. C. 116: “That if the plaintiffs knew when the bond was given that their agent was in default, and indebted to them in his pre-existing agency, and yet concealed this fact, and held him out to the sureties as trustworthy, either expressly or impliedly, such conduct would be a fraud upon the sureties, and would make void the bond as to them.” Applying this decision, we find that in the case at bar the insurance company did not conceal the fact of Crittenden’s former indebtedness, and did not hold him out as trustworthy. The subject was never mentioned between Bartlett and the agent of the insurance company who acted in the premises. See, also, *La Rose v. Logansport Nat. Bank*, 102 Ind. 332; 1 N. E. 805; *Home Insurance Co. v. Holway*, 55 Iowa, 571; 8 N. W. 457; *Remington Machine Co. v. Kezertee*, 49 Wis. 409; 5 N. W. 809; *Home Machine Co. v. Farrington*, 82 N. Y. 121; *Bostwick v. Van Voorhis*, 91, New York, 353; *Booth v. Storrs*,

first party may retain the said one-fourth interest in the said concern for a period of one (1) year, and if at the end of said term of one year the said first party is dissatisfied with the said investment or business, then, and in that event, the said second party agrees to refund to her the said sum of two thousand five hundred (\$2,500) dollars, the purchase price of the said interest, and the said first party agrees to reconvey the said interest to the said second party, and relinquish all her rights thereto or therein.

And it is hereby further agreed by and between the parties hereto that in the event of the said first party being dissatisfied with the said business, and in the event of the purchase price being refunded to her at the expiration of the term of one year, then, and in that event, she will be entitled to one-fourth the net profits of the said business during the time she is interested in the business, and the said second party hereby agrees to pay to the said first party, in addition to the purchase price of said business above mentioned, a sum equal to one-fourth of the profits of said business during said time."

The complaint alleges that about April 1, 1892, the Western Star Brick Yard and Brick Works merged into the Northwestern Brick and Supply company, and thereafter the business was carried on under the latter name; that said business yielded a profit for the year ended March 29, 1893, of about \$10,000; that on or about January 29, 1893, plaintiff notified defendant that she was dissatisfied with the business, and demanded that on the expiration of the year the sum of \$2,500 should be refunded to her, together with the sum equivalent to one-fourth of the profits of the business; that on March 29, 1893, defendant was absent from Montana, but that about April 10, 1893, after his return, plaintiff demanded of the defendant the said sum of \$2,500 and the sum of \$2,500 as one-fourth of the profits of said brick business, but defendant refused to pay said sums; that plaintiff has been, and was at the time of the commencement of this suit, ready to fulfill her part of the agreement, and to reconvey the interest transferred to plaintiff by defendant, but defendant has refused to accept the same.

The answer denies the allegations of the complaint and sets up a counterclaim, alleging that plaintiff between January 1, 1892, and the 1st of May, 1893, became indebted to defendant upon an account for rents and money loaned to plaintiff and paid out and expended for her use at her special instance and request. The replication denied the counterclaim.

The cause was referred to a referee, who made the following material findings :

“(1) On March 29, 1892, defendant sold plaintiff one-fourth interest in the Western Star Brick Yard and Works for the sum of \$2,500, as evidenced by a written agreement heretofore set forth.

“(2) That on April 1, 1892, the property of the Western Star Brick Yard was transferred to the Northwestern Brick and Supply company, having a capital stock of \$10,000, of the par value of one dollar per share.

“(3) That said transfer was made with the knowledge and consent of plaintiff and defendant, and with intent that the contract should remain in force as to the new company, and that plaintiff accepted 2,500 shares of the new company in lieu of her interest in the old one, and that it appears that on March 20, 1893, 2,475 shares of the new company were issued to the plaintiff and 25 shares to her husband, C. Schultz.

“(4) That at the end of the year, and prior thereto, the plaintiff expressed her dissatisfaction with the investment, and demanded the return of the purchase money, and her share of profits; but that no notice of the dissatisfaction or tender of stock was made on March 29, 1893.

“(5) That in the beginning of April, 1893, plaintiff demanded the return of the purchase money and share of profits, and offered to return the stock, but the offer was refused.

“(6) That the reason and grounds given by defendant for refusing were that there had been no profits during the year, and that the Northwestern Brick and Supply company had notes towards the payment of which plaintiff or her husband should contribute before defendant refunded to her the said purchase money.

first party may retain the said one-fourth interest in the said concern for a period of one (1) year, and if at the end of said term of one year the said first party is dissatisfied with the said investment or business, then, and in that event, the said second party agrees to refund to her the said sum of two thousand five hundred (\$2,500) dollars, the purchase price of the said interest, and the said first party agrees to reconvey the said interest to the said second party, and relinquish all her rights thereto or therein.

And it is hereby further agreed by and between the parties hereto that in the event of the said first party being dissatisfied with the said business, and in the event of the purchase price being refunded to her at the expiration of the term of one year, then, and in that event, she will be entitled to one-fourth the net profits of the said business during the time she is interested in the business, and the said second party hereby agrees to pay to the said first party, in addition to the purchase price of said business above mentioned, a sum equal to one-fourth of the profits of said business during said time."

The complaint alleges that about April 1, 1892, the Western Star Brick Yard and Brick Works merged into the Northwestern Brick and Supply company, and thereafter the business was carried on under the latter name; that said business yielded a profit for the year ended March 29, 1893, of about \$10,000; that on or about January 29, 1893, plaintiff notified defendant that she was dissatisfied with the business, and demanded that on the expiration of the year the sum of \$2,500 should be refunded to her, together with the sum equivalent to one-fourth of the profits of the business; that on March 29, 1893, defendant was absent from Montana, but that about April 10, 1893, after his return, plaintiff demanded of the defendant the said sum of \$2,500 and the sum of \$2,500 as one-fourth of the profits of said brick business, but defendant refused to pay said sums; that plaintiff has been, and was at the time of the commencement of this suit, ready to fulfill her part of the agreement, and to reconvey the interest transferred to plaintiff by defendant, but defendant has refused to accept the same.

The answer denies the allegations of the complaint and sets up a counterclaim, alleging that plaintiff between January 1, 1892, and the 1st of May, 1893, became indebted to defendant upon an account for rents and money loaned to plaintiff and paid out and expended for her use at her special instance and request. The replication denied the counterclaim.

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“(2) That on April 1, 1892, the property of the Western Star Brick Yard was transferred to the Northwestern Brick and Supply company, having a capital stock of \$10,000, of the par value of one dollar per share.

“(3) That said transfer was made with the knowledge and consent of plaintiff and defendant, and with intent that the contract should remain in force as to the new company, and that plaintiff accepted 2,500 shares of the new company in lieu of her interest in the old one, and that it appears that on March 20, 1893, 2,475 shares of the new company were issued to the plaintiff and 25 shares to her husband, C. Schultz.

“(4) That at the end of the year, and prior thereto, the plaintiff expressed her dissatisfaction with the investment, and demanded the return of the purchase money, and her share of profits; but that no notice of the dissatisfaction or tender of stock was made on March 29, 1893.

“(5) That in the beginning of April, 1893, plaintiff demanded the return of the purchase money and share of profits, and offered to return the stock, but the offer was refused.

“(6) That the reason and grounds given by defendant for refusing were that there had been no profits during the year, and that the Northwestern Brick and Supply company had notes towards the payment of which plaintiff or her husband should contribute before defendant refunded to her the said purchase money.

“(7) That, although it appears that 25 shares of the stock during all of the year 1892, after June 6th, stood in the name of plaintiff's husband, there is nothing to show that either party considered that plaintiff's contract with defendant impaired by reason of that fact. That defendant considered the said contract still valid, is evidenced by the fact that in December, 1892, he offered to refund to plaintiff the said purchase money upon a return of the stock.

“(8) That there were no profits in the business; that the counterclaim set up by defendant was established in the sum of \$106.91 for rentals and money loaned.”

The referee made conclusions of law to the following effect :

“(1) That under the contract, in the event of plaintiff's election to demand reimbursement, she was not liable for any of the debts or losses of the Northwestern Brick and Supply company.

“(2) That plaintiff could not demand a return of the purchase money, or an accounting for profits, before the expiration of the year, and that demands prior to the end of the year were only notices of plaintiff's election to be made at the end of the year.

“(3) That the demands made by plaintiff for the return of the purchase money and share of the profits in April and May, 1893, were made within a reasonable time after the expiration of the year.

“(4) That under the contract it was not necessary that an offer to return the stock should accompany the act of declaration by which plaintiff gave notice to defendant of her dissatisfaction with the investment, and of her election to be reimbursed, but that it was necessary that plaintiff should have the ability, as well as the willingness, to reconvey the full amount of the stock to the defendant.

“(5) That defendant's liability became fixed by the notices given before and after the expiration of the year.

“(6) That the amount due to plaintiff under the contract of March 29, 1893, was the amount of the purchase money, viz: \$2,500, less \$106.91, due by plaintiff to defendant, upon the

payment of which sum defendant was entitled to the reconveyance to him of 2,500 shares of the stock of the Northwestern Brick and Supply company.

“(7) That during the trial, plaintiff tendered to defendant a certificate of 2,500 shares of stock of the Northwestern Brick and Supply company, indorsed in blank, and demanded the sum of \$2,500, which tender and demand were by defendant refused, whereupon the said certificate was placed in the hands of the referee, and is now deposited with the clerk of the court.”

The referee recommended that plaintiff have judgment against defendant for the sum of \$2,393.09, with interest and costs, and that upon payment of the judgment, defendant was entitled to the reconveyance of 2,500 shares of stock. Judgment was entered in accordance with the referee's report. The defendant moved for a new trial, assigning as grounds therefor that the evidence was insufficient to justify the findings of the referee, and that the referee erred in his several conclusions of law. This motion was overruled, and appeal taken to this court from the order overruling the motion for a new trial and from the judgment.

C. P. Drennan and Forbis & Forbis, for Appellant.

I. The uniform rule in all cases of rescission, whether founded upon express contract, or for fraud, or breach of warranty is, that the party rescinding must put the other party in *statu quo*. (*Conner v. Henderson*, 8 Am. Dec. 103; *Chance v. Commissioners, etc.*, 35 Am. Dec. 131; *Hynson v. Dunn*, 41 Am. Dec. 100; *Waite v. Vinson* 14 Mont. 405.)

II. The transfer by plaintiff of twenty-five shares of stock to her husband should defeat her right upon two grounds. First. By selling the property or part thereof she determined to treat it as her own, and consequently lost her right of rescission. The property was hers if she wished to take it, but if she intended to rescind she should not have exercised

any control over it, which would evidence an intention not to rescind. Second. She was not in a position to reconvey to O'Rourke that which she was required to reconvey in order to rescind. If she could offer O'Rourke 2,475 shares, and such would be a good tender, then any less number would have been equally efficacious. (*Bryant v. Isbrugh*, 74 Am. Dec. 655. Note page 661. *Bailey v. Fox*, 78 Cal. 389; *Kimball v. Cunningham*, 3 Am. Dec. 230; *Durrett v. Simpson*, 16 Am. Dec. 115; *Voorhees v. Earl*, 38 Am. Dec. 588.)

III. No actual tender was made by plaintiff until the trial of the cause. This is not a tender of rescission, and we think should prove fatal to her recovery. (*Herman v. Hoffenegger*, 54 Cal. 161.)

IV. Plaintiff did not give any notice of rescission upon the expiration of the year, and not until sometime afterwards. She should have rescinded at the time stipulated in her contract, and at no other time. She should not be allowed to ascertain whether the investment was a good one or not, but was held strictly to the time as provided in the agreement.

V. The stock tendered was stock which the plaintiff had transferred to another after the expiration of the year. It is therefore contended: (1) That this stock having been transferred after the time for rescission, and before the commencement of the action, this constitutes an act of ownership over the property which is absolutely incompatible with the right to rescind. That plaintiff by this act practically converted the property and waived any right of cancellation. (2) The defendant is not required to accept the stock from any one but the plaintiff herself. The right to rescind is a personal right and can be enforced only by the party with whom the contract was made. At the time of the tender O'Rourke objected to receiving the same, because as he was informed the same were attached. (*McCulloch v. Scott*, 56 Am. Dec. 561; *Akerly v. Vilas*, 21 Wis. 89; *Grymes v. Sanders*, 93 U. S. 55; *Duncan v. Jeter*, 39 Am. Dec. 342; *Ray v. Thompson*, 66 Mass. 281; *Lynch v. Wilford*, 59 N. W. 311.)

Toole & Wallace, for Respondent.

I. Appellant contends that respondent should have notified him of her dissatisfaction precisely at the end of the year or lose her option under the contract. There was no time fixed under the contract for giving notice of her desire in the premises; indeed, there was no notice provided for at all. If the notice is required the parties not seeing proper to fix any time within which it should be given, the law allows a reasonable time. (*Chamberlain v. Fuller*, 9 Atl. (Vt.) 832, 4 New Eng. Rep. 614; Am. & Eng. Ency. of Law, Vol. 3, 929, sub. 100, page 932, and numerous authorities cited under notes 2 and 3.) The condition precedent to the right to rescind, as it is termed, is respondent's dissatisfaction with the investment or business at the end of a year. There being no provision at all for notice of such dissatisfaction, if necessary at all it is because the law implies that it shall be given. Delay in the exercise of the right may be evidence of a waiver of it, yet if exercised within a reasonable time this is all the law requires. (*Williams v. N. J. S. R. C.*, 29 N. J. Eq. 311, 319 and 320; *Williams v. N. J. S. R. C.*, 27 N. J. Eq. 277, 289 *et seq.*; *Atchinson, etc., v. Burlingame, etc.*, 59 Am. Rep. 578.) The condition precedent existing on the 29th of March there is no room even for a presumption of acquiescence. (*Miller v. Cox*, 31 Pac. 161.) Assuming then that the law imports into this contract the duty of giving the notice the authorities clearly show that it was given within such time. (19 Am. & Eng. Ency. of Law, page 1090 and 1091, and numerous citations there given.)

II. It is of no consequence that the stock tendered may not have been the same stock issued for respondent's interest in the property, nor is it of any consequence that a part or all of it may have stood in the name of some person other than defendant. (*Rosevelt v. Brown*, 11 N. Y. 151, 152, 154.)

III. Appellant basing his refusal to pay upon utterly untenable grounds, dispensed with any further action on the part of the respondent, and cast upon himself the burden of show-

ing respondent's inability to comply. (*Hansen v. Staren*, 33 Pac. 266 *et seq.*; *Eames v. Heaver*, 43 Pac. R. 1120, 1122; *Newell v. Nicholson*, 17 Mont. 389; *Chum v. Buches*, 22 Pac. 426, 427.)

IV. If appellant intended to stand on respondent's inability to comply with the contract he should have offered to pay or declined generally. But when he went further and repudiated the contract or put his refusal upon particular grounds which were not at all tenable, he precludes himself from interposing the objection urged and a tender in court satisfied the requirements of the law. (Hermann on Estoppel and Res. Adj., § 280, note 3, page 947; *Davis v. Arthur*, 96 U. S. 148; *Herberger v. Huseman*, 27 Pac. 428.)

V. We submit that when appellant told respondent and her attorney Cotter that he wanted nothing to do with her and she must go to court, he waived a tender of the stock. (*Miserole v. Archer*, 3 Bosw. (N. Y.) 376; *Bradford v. Foster*, 87 Tenn. 11.) That when he refused upon the specific grounds that respondent should pay certain notes not due to him or provided for in the contract, he waived all other objections to the sufficiency of the tender. (*Whelan v. Riley*, 61 Mo. 565; Am. & Eng. Ency. of Law, Vol. 25, page 916, subd. 9, note 2.) That the refusal to accept because he was informed the stock had been attached dispensed with proof that she controlled or had the stock. (*Abrams v. Suttles*, Busb. (N. C.) 99; *Ashburn v. Poulter*, 35 Conn. 553.) That the evidence of respondent that appellant was absent from the state at the time he claims the tender should have been made, and which is taken as true in this case, dispensed with the tender. (*Kling v. Child*, 30 Minn. 366, 21 *id.* 15; *Southworth v. Smith*, 7 Cush. (Mass.) 391.) That the offer to deliver the stock endorsed, which must for the purposes of this case be assumed, was a valid tender and whether indorsed or not, no objection was made on that account, which could have been remedied. (*Wilson v. Hill*, 88 Cal. 92; *Davis v. Leyson*, 17 Mont. 220.) That under appellant's theory of the case a tender or its equivalent only required respondent to keep the

stock where she could deliver it upon demand, within a reasonable time, and she produced it in court without any demand. (*Sanders v. Peck*, 131 Ill. 407; *Norton v. Baxter*, 41 Minn. 146.)

VI. The appellant, by his rejection of the tender, or declarations and actions dispensing with it, converted the respondent into a bailee, who thereafter held the stock in that capacity for him, and who was liable to him for a conversion of it. (*Sheldon v. Skinner*, 4 Wend. (N. Y.) 525; 21 Am. Dec. 161; *Lamb v. Laythrop*, 13 Wend. (N. Y.) 95, 97 Am. Dec. 174; *McGillon v. Smizer*, 18 Mo. 111; *Fisk v. Holden*, 17 Texas 408; *Oakland, etc. v. Applegarth*, 7 Pac. 139.) Conceding that the delivery of the stock and payment of the contract price were concurrent acts, the tender of the stock or its equivalent fixed the liability of appellant to pay, and the price of the stock is what is sued for. (*Clark v. Continental, etc.*, 57 Ind. 138; *Weiss v. Mau Chunk, etc.*, 58 Pa. St. 295, 301; *Quick v. Lemon*, 105 Ill. 578.)

HUNT, J.—The plaintiff is seeking to enforce the provisions of the agreement entered into between herself and the defendant, O'Rourke, and, being dissatisfied, sues to avail herself of the right given to her under the contract to have the purchase price of \$2,500 refunded to her, together with a sum equal to one-fourth of the profits of the business during the period of one year. The district court was of opinion that plaintiff had made out her case, and gave her a judgment. We will briefly notice the errors relied on by appellant, defendant.

The defendant objects to the testimony and findings to the effect that the agreement between the parties should apply to the Northwestern Brick and Supply company, and argues that it only applied to the original sale of the property of the Western Star Brick Yard and Brick Works.

We do not think the point is well taken. The concern in which the plaintiff bought a one-fourth interest was merged into the Northwestern Brick and Supply company. Shortly

after the contract was entered into, the corporate stock of the new company was issued to plaintiff, defendant, and other owners. This stock was received by the parties to the agreement, and took the place of the title of the property conveyed. (*Mayo v. Knowlton*, 134 N. Y. 250, 31 N. E. 985.) It was satisfactorily established upon the trial before the referee that the parties agreed to this merger or transfer. Again, no issue was raised in the pleadings upon the averment of the plaintiff that the original company was merged into the Northwestern Brick and Supply company. The case was tried, too, upon the theory that the stock issued to the owners represented their title in the property made the subject of the agreement between the parties to this action. We therefore think that if a tender by plaintiff was necessary at all, 2,500 shares of the stock of the corporation formed was all that was necessary under the agreement to put the defendant (appellant) in *statu quo*.

The question of tender is by far the most important point in the case. The defendant urges that there never was a tender until trial, and no evidence of waiver by defendant. It appears by plaintiff's testimony that prior to the expiration of the year at the end of which she could avail herself of her right to be repaid the \$2,500 and to redeliver the stock to the defendant, she expressed dissatisfaction with the business. About 30 days before the expiration of the year, she took her stock, handed it to the defendant, and asked him to give her her money, and whatever the books showed her share of the profits might be. The defendant told her that she could have nothing. Plaintiff does not testify, nor does the evidence show, that she ever offered by technical tender to the defendant the stock at any time after March 29, 1893, and before the trial of the action, but it does appear that an account of Mrs. Schultz for the \$2,500 was presented for collection to the defendant in March or April, 1893; that the defendant looked it over, and said he would pay the account whenever she paid her share of a promissory note on which they were together bound. The defendant himself testified that Mrs.

Schultz did not notify him before the 29th of March that she was ready and willing to reconvey or relinquish her rights in the corporation, but admitted that he always told her that he would give her the original money that she had put into the investment; that these conversations occurred in December, 1892, or January, 1893, but that the plaintiff told him she wanted a dividend. The defendant also admitted that he had had a conversation with Mr. Cotter, an attorney at law, representing the plaintiff, and said that he had told Mr. Cotter, after March 29, 1893, that there were certain moneys due by Mrs. Schultz for moneys loaned and other matters, and that when Mr. Cotter told him that Mrs. Schultz had directed him to settle the thing up, Cotter said: "I would try and settle up on that basis;" that plaintiff told him in April that she was dissatisfied, and wanted a dividend, but that she never took any stock to him before the 29th of March, 1893, and never made an offer to deliver the stock to him. Mr. Cotter testified that about the time that the year expired under the contract he went to the defendant at the request of plaintiff to get a settlement of their matters; that he told defendant that plaintiff was anxious to settle the matter up; that defendant said there was a note in the bank, and that, if plaintiff would pay her share on that note, he was ready to settle with her. Mr. Cotter said that he had no authority to accept anything but what the contract called for, and could not make such a settlement. A day or two after that Cotter advised O'Rourke that he had better settle the thing up in some way, and that he would see Mrs. Schultz, to which O'Rourke replied he would have nothing to do with it.

From this evidence we do not think that there ever was a formal actual tender of any stock after March 29, 1893, until the trial. The tenders made before that time were not good, because under the terms of the contract itself the defendant was not obliged to return to her the \$2,500 invested until the expiration of one year. All such tenders were premature. *Bcwen v. Julius*, (Ind. Sup.) 40 N. E. 700. There having been, therefore, no actual tender of the stock after the expira-

ation of the year, until the trial at least, we must ascertain whether or not the acts and declarations of the defendant dispensed with the formality of a tender.

Turning from the immediate question an instant, let us say that we are not convinced that under the terms of the agreement it was necessary for plaintiff, prior to suit, to make a tender by actually offering to defendant the pieces of paper constituting the certificates of stock before she could recover. (Pomeroy's Eq. Jur. § 1407, and note.) The covenants of the agreement were mutual and dependent. If she were dissatisfied at the end of the year, then, and in that event, defendant agreed to refund to her the \$2,500 she paid for her interest in the business, and she in turn agreed to reconvey to him such interest. The performances were to be simultaneous. That she was dissatisfied, and expressed such dissatisfaction to defendant, is indisputably proven. Such being the case, is it not a fair construction of the contract to say that when she made known that dissatisfaction, it devolved upon defendant to pay or offer her the \$2,500, agreed to be paid, and thereupon it at once became her duty to reconvey to him? We think so. There was no express covenant on plaintiff's part to tender, and it would seem that, where the covenants between the parties were mutual and dependant, the necessity of strict formalities by a tender before trial ought not to have been imposed upon plaintiff. (*Holmes v. Holmes*, 9 N. Y. 525; 12 Barb. 137; *Irvin v. Gregory*, 13 Gray, 215; *Kane v. Hood*, 13 Pick. 281.)

But, granting that plaintiff ought to have actually presented the certificates of stock to defendant after March 29, 1893, we think that the acts and declarations of defendant dispensed with greater formality than was observed. When he told Cotter that he was ready to settle when plaintiff paid her share on a certain note, not a liability of hers under the contract, and again thereafter, when approached for a settlement, said he would have nothing to do with the matter, these declarations were equivalent to saying that the stock alone would not be received if actually offered. There is ample justification to

infer that the production of the certificates and their formal tender was waived. It was, therefore, unnecessary to offer the certificates themselves, as the law, under such circumstances, does not require a man to perform a nugatory act. (*Wesling v. Noonan*, 31 Miss. 602; *Hazard v. Loring*, 10 Cush. 267; 7 Wait, Act. & Def. 593; *Ashburn v. Poulter*, 35 Conn. 553.)

We cannot uphold the contention of appellant that plaintiff had lost her right to reimbursement by having transferred 25 shares of the stock to her husband before the year had expired. One share of stock was as good as another. She was evidently willing to transfer 2,500 shares, and there is nothing to show that she was not fully able to transfer 2,500 shares, as required by the contract, the instant that defendant would comply with his part of the agreement. (*Eames v. Haver*, (Cal.) 43 Pac. 1120.) The identical shares originally made over to her were not necessarily the only shares which she could return to defendant. As said, one share was as good as another, and represented the same interest in the property. (*Colby v. Stevens*, 38 N. H. 191; *Thompson v. Lyon* (W. Va.) 20 S. E. 812; *Park v. Wiley*, 67 Ala. 310.)

But if we concede that there was no waiver of formal tender before trial, still our decision may be safely put upon another ground. Upon the trial there was a formal tender of 2,500 shares, indorsed in blank, it appears, and a demand of the return of \$2,500 paid for the stock. This was refused by defendant "on the ground that it is attached according to my information, and I want everything straightened up before I accept it." No objection was made to the sufficiency of the tender or to its form, except that the stock was attached, as defendant was informed. The defendant cannot now urge any reason for refusing the stock offered on the trial other than that expressly relied on. He is held to have waived the objections that plaintiff did not have the stock in her own name. (*Wood v. Babb*, 16 S. C. 427; *Lathrop v. O'Brien* (Minn.) 58 N. W. 987; *Whelan v. Reilly*, 61 Mo. 565; *Lawson on Rights, Remedies and Practice*, § 2535; 2 *Parsons on Cont.*, 645;

Thayer v. Meeker, 86 Ill. 470; *Herberger v. Husman* (Cal.) 27 Pac. 428.)

Our conclusion upon the whole case is that the plaintiff is entitled to the sum found to be due to her by the district court, and that upon payment of such sum defendant is entitled to 2,500 shares of stock tendered and left with the clerk of the court, and agreed to be transferred by plaintiff under the contract. Judgment affirmed.

Affirmed.

DE WITT, J., concurs. PEMBERTON, C. J., not sitting.

SMITH ET AL., APPELLANTS, v. HOPE MINING COMPANY, RESPONDENT.

[Submitted June 29, 1896. Decided July 13, 1896.]

WATER RIGHTS—Adverse possession.—Where the defendant and plaintiff's predecessors had, in 1881, adjusted a controversy in respect to the use of the waters of a stream by a contract defining their respective rights and manner of use, the fact that the plaintiff and his predecessor did not use any of the water from 1883 to 1893, during which period the defendants continued to use it all as permitted under the contract, does not justify a finding that defendants by such use acquired title thereto by adverse possession,—there being no evidence that the defendant ever assumed to act otherwise than under the contract, or had ever given notice that they claimed the use of the waters adversely to plaintiffs.

SAME—Abandonment—Nonuser.—Mere nonuser of a water right is not an abandonment. (*Atchinson v. Peterson*, 1 Mont. 561; *McCauley v. McKeig*, 8 Mont. 389; *Tucker v. Jones*, 8 Mont. 225; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558; *Gassert v. Noyes*, ante, page 216, cited.)

SAME—Abandonment—Appurtenance.—A water right necessary for the operation of a mill used for mining purposes is an appurtenance thereto, and an intention to abandon must be clearly shown. (*Tucker v. Jones*, 8 Mont. 225; *Sweetland v. Olsen*, 11 Mont. 29; *Beatty v. Murray Placer Mining Co.*, 15 Mont. 314, cited.)

SAME—Abandonment—Evidence of intention.—While the nonuser of a water right for a period longer than the statute of limitations would, if standing alone, be strong evidence of an intention to abandon it, yet where the water is used as an appurtenance to a mill which was closed down for the period in question and the evidence clearly shows that there was no intention to abandon the mill, the temporary and necessary nonuser of the water during the period in which the operation of the mill was suspended, is no evidence whatever of an intention to abandon the water right.

Appeal from Third Judicial District, Granite County.

ACTION to enjoin interference with water right. Judgment

was rendered for the defendant below by BRANTLY, J. Reversed.

Statement of the case by the justice delivering the opinion.

This was an action brought to restrain the defendant from interfering with an alleged water right of the plaintiffs. The case was tried to the court without a jury. Findings were made upon which judgment was entered for the defendant. Plaintiffs' motion for a new trial was denied, and they appeal from that order and the judgment. It appears that, prior to November 28, 1881, the predecessor of these plaintiffs was the Algonquin Mining Company. This mining company owned a mill, as did also the Hope company, the defendant, near Frost creek, in what was then Deer Lodge county. The Algonquin Company were taking water for their mill out of Frost creek. Below the head of the Algonquin ditch the Hope Company had a ditch, and were conveying water to their mill from the same creek.

It appears that the Algonquin people were returning a portion of the water which they used in their mill to the creek, and thus caused the water flowing to the Hope ditch to become foul and partially unfit for use. By reason of this fact the Hope Company commenced an action against the Algonquin Company to restrain them from befouling the water. This action was settled out of court by an agreement made between the two companies. That agreement provided as follows: The Algonquin Company granted, bargained, and sold to the Hope Company 15 inches of the waters of said Frost creek, and the right to the said 15 inches at the head of the Algonquin ditch, and the Algonquin Company recognized the priority of the right of the Hope Company to the waters of the said creek at said point to the extent of 15 inches; and the Algonquin Company further obligated itself to deliver to the Hope Company these 15 inches of water at the Hope reservoir near its mill, until such time as the Hope Company wished to conduct it elsewhere. The Algonquin Company further agreed that the Hope Company should have, in addi-

tion to these 15 inches of water, all the further amount of water which they needed over and above what the Algonquin Company needed in their mill ; that is to say, the Hope Company were to have 15 inches first; then the Algonquin were to have all they needed; and afterwards the Hope were to have the remainder. The expenses of ditching and boxing these waters were divided between the two companies. The Hope people in consideration of these agreements waived all claims for damages set up in their action which they had commenced, and withdrew that action. The Hope Company also relinquished to the Algonquin Company any claim to the waters of Frost creek except the rights secured to it by the preceding terms of the contract. This contract was executed by the two companies on November 28, 1881. It appears furthermore that the Algonquin mill was operated and the water used by it up to 1883 or 1884. The court found that it was used only until 1883.

The court made the following findings of fact :

“First. The court finds that since the year 1883, and up to the time of the commencement of this action in January, 1893, the defendant has been in the actual, continued and adverse possession and use of all the waters of Frost creek in Granite county, Montana, flowing therein at the head of what is known as the Algonquin ditch, at which point the defendant diverted the water, at all seasons of the year, other than flush or flood seasons, and to the full capacity of the said Algonquin ditch.

“Second. That the amount of water usually flowing in the said Frost creek in ordinary seasons, when the same is not affected by floods or freshets, is twenty-eight (28) inches measured as provided by the statutes of Montana.

“Third. That since the year 1883, the defendant has used the waters of Frost creek, to the extent hereinbefore found, for a useful and beneficial purpose, and at the date of commencement of this action was so using the same.

“Fourth. That since the year 1883, and until a short time prior to the commencement of this action in January, 1893, the Algonquin company, and those claiming under it, have

not used any of the waters of the said Frost creek for any purpose whatever.

“Fifth. That the plaintiff abandoned whatever right it had to the use of the waters of the said Frost creek in the year 1883, and thereby lost all right which it had therein prior to the year 1883.”

From these findings of fact the court declared the law to be that the defendant was the owner as against the plaintiffs, and entitled to the use of all the waters of Frost creek flowing at the head of the Algonquin ditch other than in flush or flood seasons, which amount was found to be twenty-eight inches; and as to any excess over twenty-eight inches, that the defendant is entitled to the same as against the plaintiffs to the full capacity of the ditch. Judgment was thereupon entered in favor of defendant for costs.

H. R. Whitehill, for Appellants.

Abandonment is a question of intention, and the intention can be arrived at either by express words to that effect, or by the acts or circumstances by which the intention is made manifest. Nonuser is not evidence of abandonment, but is only a fact, a circumstance to show intention to abandon. (*Atchison v. Peterson*, 1 Mont. 461; *McCauley v. McKeig*, 8 Mont. 389; *Tucker v. Jones*, 8 Mont. 225; *Middle Creek D. Co. v. Henry*, 15 Mont. 558; *Wimer v. Simons*, 39 Pac. Rep. 989; *Nichols v. McIntosh*, 34 Pac. Rep. 278.) It was error for the court below to find that the respondent had been in the adverse use and possession of all of the waters of Frost creek flowing in the Algonquin ditch to its full capacity since the year 1883. In the first place the respondent was not in the condition or situation to raise the question of adverse possession. It was using the waters as they flowed through the Algonquin ditch, under the agreement above referred to, and not otherwise. It was using the ditch by permission of the Algonquin company and its successors, the appellants. Under the authorities the respondent could not hold the ditch or the water running through the ditch by adverse possession without giving notice

to the Algonquin company or to its successors that it was claiming the ditch and the water adversely to the appellants or its predecessors in interest. (*Crandall v. Woods*, 8 Cal. 136; *Water Co. v. Crary*, 25 *id.* 504; *American Co. v. Bradford*, 27 *id.* 360; *Anaheim Water Co. v. Water Co.* 64 *id.* 185; *Thomas v. England*, 71 *id.* 458; *Alta Land Co. v. Hancock*, 85 *id.* 226; *Doyle v. Wade*, 11 Am. St. Rep. 342, note; *Huston v. Byber*, 17 Or. 140.) The Algonquin company and its successors had no notice from the respondent that its use was hostile to them, or that respondent continued to use the water other than under the agreement. (1 Am. & Eng. Ency. of Law, 296, Div. 48; 19 *id.* 12 Div. 2; 28 *id.* 1005, Div. 2.)

Forbis & Forbis, for Respondent.

Under the agreement between the Algonquin company and the respondent, the most that can be claimed by appellants is that it was a purchaser of the water from the Hope company. But that fact will not prevent the running of the statute. (*Ford v. Sawyer*, 57 Cal. 65; *Franklin v. Dorland*, 28 Cal. 175; *Dorland v. Magilton*, 47 Cal. 485; *Hartman v. Reed*, 50 Cal. 485.) But the Algonquin company was not even a purchaser. The agreement does no more than recognize certain rights in the Algonquin company. After the agreement the parties stood at arms length and from that time on neither party was precluded from acquiring title in any manner recognized by law. (*Davis v. Gale*, 32 Cal. 26; *Cox v. Clough*, 70 Cal. 347; *Union Water Co. v. Crary*, 25 Cal. 504; *Nichols v. McIntosh*, 34 Pac. 278; Am. & Eng. Ency. of Law, Vol. 28, pp. 1005 to 1017 and notes.)

DE WITT, J.—On appeal, the plaintiffs contend that the court erred in its findings of fact in two respects. First, that the evidence did not sustain the finding that the defendant had been in the actual, continued and adverse possession and use of all the waters of Frost creek as set forth in finding No. 1, from 1883 to 1893; second, that the evidence did not sustain the finding that the plaintiffs abandoned the right which they

had in the use of the waters of Frost creek in 1883. We will examine these two contentions.

(1) We are clearly of opinion that the evidence does not in any degree sustain the finding of adverse possession by the defendant. The rights of the respective parties, as far as this action is concerned, date from the compromise contract of November 28, 1881. At that time there was a controversy between the two mining companies as to the use of the waters of Frost creek. That controversy, and the lawsuit growing out of it, were settled by the contract described. It was thereby agreed that the Hope company instead of taking its water, as theretofore, at a point below the head of the Algonquin ditch, should take it through the Algonquin ditch and flumes. It was settled between the two mining companies that the Hope company had the prior right to the use of fifteen inches; and it was also conceded that they should have the use, as far as the Algonquin company was concerned, of a further amount of water which was over and above the water necessary for the Algonquin mill. Thereupon the companies used the water through the common vehicle—the Algonquin ditch. They divided the expenses of taking out and delivering the water through this ditch and the flumes and boxes connected therewith. When the Algonquin mill closed down in 1883, it appears by the evidence that the Hope company continued to take the water through this same common vehicle. They had a right to take fifteen inches, and they had a further right to take all over fifteen inches which the Algonquin company were not using. In fact the Algonquin company were using no water from 1883 to 1893; therefore, the Hope company, by reason of the contract, had, as against the Algonquin company, the right to all the waters of the creek which was conveyed into the ditch. These waters they took as they had a right to take them under the terms of the contract. We cannot understand how it was held that the Hope company were acting adversely to the Algonquin company when they were simply doing exactly what the Algonquin company had contracted that they might do. There is no evidence what-

ever that the Hope company ever purported to act otherwise than under the contract. They never notified the Algonquin people, either by word or deed, until the controversy arose in 1893, out of which this present lawsuit originated, that they claimed the use of these waters adversely to the Algonquin company. In our opinion, the evidence shows beyond any question that the Hope people were using the waters under the contract, and not adversely to the Algonquin. We are therefore of opinion that the finding of the adverse use and possession by the defendant is not sustained by the evidence.

2. We are also of opinion that the evidence does not sustain the finding that the plaintiffs had abandoned their right to the use of the waters which they owned, as against the defendant, in 1883. It is true that the evidence shows without controversy that the Algonquin Company did not use the waters, in their mill or otherwise, for a period of about nine years following 1883. But mere nonuser of a water right is not an abandonment. (*Atchison v. Peterson*, 1 Mont. 561; *McCauley v. McKeig*, 8 Mont. 389; *Tucker v. Jones*, 8 Mont. 225; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558; *Gassert v. Noyes*, *ante*, page 216.)

The nonuser of water for so long a period, and especially a period longer than the statute of limitations, is certainly very potent evidence, if it stood alone, of an intention to abandon. Abandonment is a question of intention. (See cases last cited.) But whatever force the fact of nonuser for nine years may have had in showing an intention to abandon, that force was wholly offset and contradicted by the other evidence in the case, so as to leave, in our opinion, not even a conflict of testimony. It appears that, when the Algonquin mill was shut down in 1883, a man was employed to drain all the pipes and oil the machinery, for the reason that the company could not use the water when the mill was shut down. The water was a necessary appurtenance to the mill,—necessary, as appears by the testimony, as a matter of fact, and an appurtenance as a matter of law in this jurisdiction. (*Tucker v. Jones*, 8 Mont. 225; *Sweetland v. Olsen*, 11 Mont. 29; *Beatty v. Murray Placer Mining Co.*, 15 Mont. 314.)

During the period while the mill was shut down—that is for nine years—it was cared for by the owners. It was left in charge of persons resident in the territory and the state of Montana. Some one always had charge of the property, and it appears by the evidence that for a very large portion, if not all, of the time a custodian or watchman was upon the premises, caring for them. It cannot be contended for a moment that there was a scintilla of evidence tending to prove that the Algonquin Company intended to abandon the mill. Every act shows that they did not so intend. They did not use the water, simply because the machinery of the mill was not in motion. When it thus appears that the intention was clearly not to abandon the principal estate (that is. the mill), we cannot hold that the fact of temporary and necessary nonuser of the appurtenance (that is, the water) was any evidence whatever of an intent to abandon that appurtenance. The appurtenance was a necessity to the mill, and the intention to abandon that appurtenance must clearly appear. (See cases last cited.) We think the contrary clearly appears in this case. If we sustain the finding of the district court as to the abandonment, it would be holding, in practical affairs, to this effect, viz., that if, through the vicissitudes of mining, a company finds itself obliged to close its mill for a considerable period,—a period as long as the statute of limitations,—then, in order to preserve the water right appurtenant to the mill, they will not be permitted to allow the water to remain idle, but must continue its use. To continue its use they must keep the machinery of the mill moving. These views lead into absurdities. They simply demonstrate that, if a milling or mining company is obliged to close its mill, and thus cease the use of its water right for a period equal to the statute of limitations, it will by such an act be deemed to have abandoned the water right, which is an absolutely necessary appurtenance to the mill. We cannot subscribe to any such doctrine as this. As above noted, whatever force as evidence the fact of the nonuser of the water had was wholly destroyed by the conclusive evidence that the Algonquin Company did not abandon its mill. In the

face of the evidence of intention to retain the mill, the mere fact that it did not use the water when it could not use it is of no weight whatever. It does not even raise a conflict in testimony.

These two findings which we have reviewed being set aside, as not sustained by the evidence, there is nothing left to sustain the judgment. It is therefore reversed, and the case remanded, with directions to grant a new trial.

Reversed.

HUNT, J., concurs. PEMBERTON, C. J., not sitting.

THE STATE SAVINGS BANK OF BUTTE CITY, APPELLANT, v. JOHNSON ET AL., RESPONDENTS.

[Submitted June 30, 1896. Decided July 13, 1896.]

STATUTE OF LIMITATIONS—Action for penalty—Failure of trustees to file annual report.—An action to recover from the trustees of a corporation an indebtedness of the corporation for which they had become personally liable for failure to file an annual report as required by statute. is, for the purpose of applying the statute of limitations, an action for a penalty, and therefore within section 45, of the Code of Civil Procedure (1887), providing that an action for a penalty shall be commenced within one year from the time the cause of action accrued.

SAME—Annual report of corporations—Failure to file—Successive defaults.—The liability of trustees of a corporation for failure to file an annual report must be enforced in an action commenced within one year from the time of the default, and the continuance of the default in successive years does not have the effect of renewing the liability on each default.

Appeal from Second Judicial District, Silver Bow County.

ACTION for a penalty. Judgment was rendered for the defendants below by McHARTON, J. Affirmed.

Statement of the case by the justice delivering the opinion.

Upon the sustaining of the defendants' demurrer to the complaint, judgment was rendered in their favor, and the plaintiff appeals.

The complaint sets up that the Bighole Lumber Company is, and since May 4, 188—, has been, a corporation organized under the laws of the state of Montana, and that the defendants Trask, Johnson and Williams are, and ever since the organization of the corporation have been, its trustees. This action was brought against these three trustees. It appears by the complaint that the Bighole Lumber Company became indebted to the plaintiff as follows: \$2,048.50 August 1, 1892; \$1,492.71 June 10, 1891; \$1,362.15 June 1, 1891, and \$1,042.12 June 6, 1892. These sums have never been paid. The Bighole Lumber Company never made any report as required by the statutes of the state, and for this reason plaintiff seeks to charge the trustees with the amounts above mentioned. (*Gans v. Switzer*, 9 Mont. 408.)

The demurrer was upon the ground that the action was barred by the provisions of section 45, Code of Civil Procedure, 1887. That section provides that an action for a penalty or a forfeiture, when the action is given to an individual, or to an individual and the state, except when the statute imposing it prescribes a different limitation, shall be commenced within one year from the time the cause of action accrued.

The contention upon the demurrer was that the action of this plaintiff against the trustees of the Bighole Lumber Company was one for a penalty, and therefore was barred, because the last item of the indebtedness against the Bighole Lumber Company accrued on August 1, 1892, and the default of the trustees in making a report occurred on September 20, 1892, and that this action was not commenced until February, 1894, which was more than one year after the accruing of the cause of action.

Robinson & Stapleton, for Appellant.

Corbett & Wellcome, for Respondents.

DE WITT, J.—There are only two points to be decided in this case: (1) Is this an action for a penalty? If it is, the cause of action accrued as to some items on September 20,

1891, and in 1892 as to others, when the trustees failed to make their reports, and more than one year elapsed from then to the commencement of this action. This would be sufficient to dispose of the case, except that it is contended further (2) that, even if the year's limitation has run since September 20, 1891 or 1892, still it appears by the complaint that the trustees again defaulted on September 20, 1893, and therefore again started the cause of action running. These two questions will be examined.

1. Is the action one for a penalty? We have no doubt that this action is one for a penalty, as far as the application of the statute of limitations is concerned. (*Halsey v. McLean*, 12 Allen, 438; *Bank v. Bliss*, 35 N. Y. 412; *Kerr, Bus. Corp.*; *Larson v. James*, (Colo. App.) 29 Pac. 183; *Irvine v. McKeon*, 23 Cal. 472; *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554; *Engine Co. v. Hubbard*, 101 U. S. 188; 2 Mor. Priv. Corp. § 907; 3 *Thomp. Corp.* §§ 4144, 4166; 1 *Cook Stock, Stockh. & Corp. Law*, § 223.)

A statute of this nature is not universally held to be penal. (*Thompson on Corporations*, § 4165; *Morawetz on Private Corporations*, § 907, *et seq.*) But we are of opinion that, in applying the appropriate section of the statute of limitations, the action is classified as penal. (*Gans v. Switzer*, 9 Mont. 413; *Elkhorn Trading Co. v. Tacoma Min. Co.* 16 Mont. 322; *Whethey v. Kemper*, 17 Mont. 491.)

Therefore, the action being for a penalty, the cause of action is barred in one year from the accruing thereof. (*Code Civil Procedure*, 1887, § 45.) The accounts against the corporation matured at different times during the years 1891 and 1892. The trustees defaulted in making their report, required by law, both in 1891 and 1892, and, indeed, during every year. As to some of the accounts, the cause of action arose against the trustees upon their default in 1891, and upon others in 1892. This action was commenced in 1894. Therefore as to all of the accounts more than one year had run since the accruing of the liability by the trustees by reason of their default in filing the papers required by law.

2. These views would be sufficient for the decision of the case were it not that the appellant makes another contention. It is this: That while the liability which a trustee had incurred by reason of his default on September 20, 1892, was barred in one year,—that is to say on September 20, 1893,—still he defaulted again on September 20, 1893, and another period of one year's liability commenced to run. But this view is not sustained by the decided cases. The case of *Gans v. Switzer* is not, in its facts in point upon this proposition. We have not been able to find that any of the text writers sustain the position of the appellant, except that Mr. Kerr, in his work on Business Corporations, at page 183, makes the following remarks:

“A trustee in office at the time the corporation fails to make its annual report is liable for all the existing debts of the company, and such as may thereafter be contracted until the report is filed; and such liability attaches upon each default of the company as long as the trustee remains in office, so that, although there have been similar successive defaults of the company, and the first of which was more than three years before suit brought, but the last within three years, the action is maintainable upon the last default, and the statute of limitations is not a bar. A new and original liability is created on each default, and, if any of the defaults are within three years, such default may be made the foundation of the action. The creditor is not bound to confine himself to the first default.”

The authority of the writer for this statement is in the case of *Nimmons v. Tappan*, 2 Sweeney 652. This case was decided in the superior court of the city of New York in 1870. Mr. Kerr's book was written in 1890, and it seems that he takes his law from a decision of a *nisi prius* court, when it was the fact that at that time the court of appeals of New York had held precisely the contrary. (*Losee v. Bullara*, 79 N. Y. 404; *Rector, etc., of Trinity Church v. Vanderbilt*, 98 N. Y. 170.) In the former case, in the court of appeals, Rapallo, J., said:

“The appellants claim that the failure to file the certificate

in each year after 1868 created a new liability on the part of the defendant, and that consequently the default in 1873 and the subsequent years can be resorted to for the purpose of maintaining this action and avoiding the effect of the statute of limitations. We think this position untenable for two reasons. In the first place the statute requires that the action be brought within three years from the time the cause of action accrued.

This action was for a statutory penalty. This penalty, if it ever was incurred, was completely incurred in 1868, and the testator of the plaintiffs could then have brought his action therefor. We do not think that the continuance of the default in successive years had the effect of renewing the liability of the respondent, as would a new promise or a payment on account in the case of a liability founded on a contract." (*Loxee v. Bullard*, 79 N. Y. 406.) No authority for appellant's position is presented, other than this discredited case of *Nimmons v. Tappan*, 2 Sweeney 652.

We are of opinion that the demurrer to the complaint was properly sustained, and the judgment will therefore be affirmed.

Affirmed.

HUNT, J., concurs. PEMBERTON, C. J., not sitting.

THE MINNESOTA AND MONTANA LAND AND IMPROVEMENT COMPANY, APPELLANT, v.
BRASIER, RESPONDENT.

[Submitted July 6, 1896. Decided July 13, 1896.]

EJECTMENT—Adverse possession—Statute of limitations—Paper title.—Adverse possession of lands for the period of the statute of limitations will not be defeated because defendant's entry was not made under a paper title. (*National Mining Co. v. Powers*, 3 Mont. 344, cited.)

Appeal from Seventh Judicial District, Yellowstone County.

EJECTMENT. Judgment was rendered for the defendant below by MILBURN, J. Affirmed.

C. R. Middleton and *O. F. Goddard*, for Appellant.

James R. Goss, for Respondent.

PER CURIAM.—This is an action of ejectment which was decided by the court without a jury upon an agreed statement of facts. Judgment was for defendant. Plaintiff appeals.

The court rendered judgment for defendant on the ground that plaintiff's claim was barred by the statute of limitations. The agreed statement of facts set forth that the defendant entered upon the land September 1, 1882, under a claim of title, claiming that it was exclusive of any other right, but not founded upon a written instrument, judgment, or decree, and that defendant had been in quiet, peaceable, open, notorious, actual, exclusive and continued occupation of said lands, and that same have been protected by a substantial inclosure by defendant of the premises in question, and that the same have been usually cultivated and improved by said defendant, Brasier, ever since that time until the commencement of this action, and that he has held the same adversely to the plaintiff and to all other parties since the said 1st day of September, 1882. The action was commenced in 1893.

Sufficient time to constitute the period of the statute of limitations had therefore run since September 1, 1882. The statutes of limitation in regard to real estate were, at the time this action was commenced, §§ 29, 30, Code Civil Procedure 1887. The statutes providing what should be deemed to be adverse possessions were §§ 35 and 36 of the same Code. We will not quote them at this time. The only contention of plaintiff against the defense of the statute of limitations was that the defendant's entry was not made under a paper title. But this contention is decided adversely to plaintiff in *Mining Co. v. Powers*, 3 Mont. 344. The question is there thoroughly discussed, and the authority of that case has never been questioned. See, also, *Lamme v. Dodson*, 4 Mont. 591, 2 Pac. 298. We shall therefore go no further than to cite the authority, and affirm the judgment of the district court.

Affirmed.

BAKER, APPELLANT v. BARTLETT, ET AL. (SINCLAIR,
INTERVENOR), RESPONDENT.

[Submitted July 1, 1896. Decided July 18, 1896.]

MORTGAGES—Record—Notice—Sufficiency of Description.—A recorded mortgage describing the premises as lot 16 in block 67 is not notice that the parties intended it to be a mortgage on lot 16 in block 57.

SAME—*Its Pendens*—Unrecorded Conveyance—Subsequent Purchaser.—The plaintiff in an action to reform a mortgage so as to describe the property intended to be mortgaged and to foreclose the same is not a "purchaser," nor is a notice of *its pendens* filed at the time of the commencement of the action a "conveyance" within section 280, Fifth Division of the Compiled Statutes, providing that every unrecorded conveyance of real estate shall be deemed void as against "any subsequent purchaser in good faith for a valuable consideration of the same real estate when his own conveyance shall be first duly recorded," so as to defeat a conveyance made by the mortgagor subsequent to the mortgage to a purchaser in good faith for a valuable consideration, without actual notice of the mortgage, whose deed was delivered prior to, but not recorded until after, the record of the notice of *its pendens*.

Appeal from Third Judicial District, Deer Lodge County.

ACTION for reformation and foreclosure of mortgage.
Judgment was rendered for the intervenor by BRANTLEY, J.
Affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiff in this case appeals from a judgment rendered in favor of the intervenor, L. H. Sinclair. The plaintiff, Hannah Baker, commenced the action to foreclose a mortgage against J. H. Bartlett and wife. The Bartletts defaulted. Sinclair filed a complaint in intervention. The case was tried as between the plaintiff and the intervenor. We will not recite the pleadings for the reason that a statement of the findings of the court will fully present the question of law decided. Epitomized, they are as follows:

J. H. Bartlett, on October 19, 1892, owned lot number 16, block 57, in the city of Anaconda. He borrowed from Thomas Leonard \$1,500, for which he gave his note for one year, and also gave a mortgage to secure the note. The intention was to mortgage lot 16, block 57, but by mistake

the scrivener wrote "block 67" in the description. Leonard assigned the note and mortgage to this plaintiff Baker. She commenced this action to foreclose the mortgage; also in the same complaint asking for reformation of the description to conform to the intent of the parties. On August 15, 1893, the intervenor Sinclair bought lot 16, block 57, from the mortgagors, paying therefor \$3,500, which was a fair price. He procured one Sawyer to examine the records of the county for incumbrances upon lot 16, block 57. Sawyer reported that there were none. Not until Sinclair had paid the full purchase price, and indeed, not until after this action to foreclose was commenced, did he have actual notice of the mortgage in favor of plaintiff. The debt was due in one year, viz: October 19th, 1893. The action to foreclose was commenced on December 8th, 1893. A notice of *lis pendens* was filed on December 11th. The deed from Bartlett and wife to Sinclair was recorded December 21st. These were the facts as found by the court. The court found the law to be that the interest of plaintiff under the mortgage and *lis pendens* was inferior to the interest of the intervenor, defendant Sinclair; that plaintiff is not entitled to a reformation of the mortgage and foreclosure of the same on lot 16, block 57, as against Sinclair, and that the intervenor Sinclair is entitled to have the complaint as against him dismissed. Judgment was accordingly entered for the intervenor. Plaintiff appeals.

John T. Baker, for Appellant.

A. J. Craven and *Ed. Scharnikow*, for Respondents.

DE WITT, J.—Two questions are presented by this appeal. First: The plaintiff contends that the intervenor was guilty of negligence in not further examining the records for incumbrances. There is nothing meritorious in this contention, for no matter what examination had been made of the records no incumbrance would have been found upon lot 16, block 57, which was the property owned by the mortgagors. The fact that they had given the mortgage on lot 16, block 67,

was not notice that they intended it to be a mortgage on lot 16, block 57. (*Goodrich Lumber Co. v. Davie*, 13 Mont. 76.)

The other question is the one which engaged the serious attention of the district court. The intervenor Sinclair bought in absolute good faith, for an adequate and valuable consideration, and without actual notice of the mortgage. Therefore, the question remains: Did the purchaser, the intervenor, have constructive notice under the law? Plaintiff's action to reform and foreclose the mortgage on lot 16, block 57, was commenced and notice of *lis pendens* was filed before Sinclair recorded his deed. Therefore, does the commencement of this action affecting real estate and the filing of a notice of *lis pendens* take precedence of a deed executed prior to the filing of the notice of *lis pendens* but recorded subsequent thereto? Under our law, the commencement of an action is not notice to persons who may deal with the subject of the action, but the filing of a notice of *lis pendens* is such notice. Our statute at the time of the transactions involved in this action was as follows:

"In an action affecting the title or the right of possession of real property, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterwards, may record in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties and the object of the action or defense, and a description of the property in that county affected thereby. From the time of filing such notice for record only shall a purchaser or incumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action, and only of its pendency against parties designated by their real name." (Sec. 70, Code Civil Procedure 1887.)

Our statute as to the conveyance of realty, Fifth Division Compiled Statutes 1887, provided as to the recording thereof as follows:

“Section 259. Every such conveyance and instrument in writing, acknowledged or proved and certified and recorded in the manner prescribed in this chapter, from the time of filing the same with the recorder for record, shall impart notice to all persons of the contents thereof, and subsequent purchasers and mortgagees shall be deemed to purchase and take with notice.

“Section 260. Every conveyance of real estate within this state hereafter made, which shall not be recorded as provided for in this chapter, shall be deemed void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate, or any portion thereof, where his own conveyance shall be first duly recorded.”

There is no question of the good faith of Sinclair involved in this case. That was settled in his favor by the findings of the court, which are not now attacked. He bought with no actual notice. Furthermore, he is not bound by any constructive notice by reason of the record of the mortgage, for the reason, as above noted, that the mortgage did not describe the premises, which are now the subject of this action. The only question left is whether the notice of *lis pendens* is such a notice under the recording laws that the claims of the plaintiff set up in the complaint shall take precedence of Sinclair's deed. The filing of the notice of *lis pendens* is a statutory matter, and the decision of this case depends upon a construction of our statutes, above quoted. The decisions under different statutes are not in point. Looking to section 260, above quoted, and reviewing its terms *seriatim*, and applying them to the facts in the case at bar, we observe that the deed of Bartlett to Sinclair is, in the language of section 360, “a conveyance of real estate within the state.” It was, following the language of the section further, “not recorded as provided for in this chapter.” It is therefore, using the section's language again, to “be deemed void as against any subsequent purchaser in good faith and for a valuable consideration of the same real estate or any portion thereof, where his own conveyance shall be first duly recorded.” Here we meet the first

question for consideration. Was the plaintiff in filing her notice of *lis pendens* a subsequent purchaser? We construed these words in *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558, in which decision we said :

“We are of opinion that the word “purchaser,” as used in section 260 is not employed in the broad sense as indicating all acquisitions of title other than by descent. We think that the word as here used means simply a buyer in the popular sense of that term. The whole spirit of the recording laws indicates this. We think the section means a buyer of the same property from the same grantor in good faith, and for a valuable consideration, and such a buyer as records his conveyance prior to any record of conveyance to the first buyer.” (Page 575.) Therefore, we are of opinion that the plaintiff in this case, when she filed her notice of *lis pendens*, was not in any sense a “buyer” of lot 16, block 57. She was simply seeking to fix a lien upon it and enforce that lien.

Proceeding to the further language of section 360, the section applies to a person “where his own conveyance shall be first duly recorded.” Therefore, applying this statute to the facts in the case at bar, we must, to sustain appellant’s contention, call a notice of *lis pendens* a conveyance, and must find that it was recorded before the deed to Sinclair. It is true that the notice was recorded before the deed; but it is also true that a notice of *lis pendens* is not a conveyance any more than was the person filing it a purchaser. The case of *Warnock v. Harlow*, 96 Cal. 294, is wholly in accord with the view which we have expressed. In that case the court said :

“Nor could the filing of the *lis pendens*, as contended by counsel, operate as a prior recording of a subsequent conveyance, so as to make the deed executed by the clerk to Brison relate back to the commencement of the action, as against the deed to Harlow, which was executed before the suit was begun, and recorded before the deed made by the clerk to Brison was executed; for Brison was not a subsequent purchaser within the meaning of the statute. If he acquired title either under the decree or deed, it must have been upon other

grounds. Nor was the *lis pendens* such an 'instrument' as the statute contemplates. The word 'conveyance' as used in sections 1213 and 1214, of the Civil Code, is defined by section 1215, and the word 'instrument' as used in the recording acts, was construed in *Hoag v. Howard*, 55 Cal. 564, where it was held to mean 'some written paper or instrument signed and delivered by one person to another, transferring the title to or creating a lien on property, or giving a right to a debt or duty,' and that it did not include a writ of attachment."

In Jones on Real Property and Conveyancing, Vol. II, a work published this year, the following remarks are made as to notice of *lis pendens*, in section 1559 :

"The doctrine of *lis pendens*, however is not carried to the extent of making it constructive notice of a prior unregistered deed; as, for instance, proceedings to foreclose an unrecorded mortgage do not constitute such a *lis pendens* as would be notice to a purchaser of the mortgaged property."

A rule thus applied to an unrecorded mortgage would equally apply to a mortgage which does not describe the land intended, and which therefore was not notice to a purchaser. Upon the same subject we find the same author remarking as follows :

"*Lis pendens* is a harsh rule in all cases, and especially so under our statute, which does not require a filing or recording in the office of the register of deeds, and a court will not extend its provisions beyond that absolutely required by the strict necessities of the case. It has never been applied, so far as our investigation goes, except where property, generally real estate, has been in actual litigation and the pleadings disclose the identical property which is the subject thereof." (*Seibel v. Bath*, Cal., 40 Pac. 756.) "Only those persons are charged with notice, or are affected by a *lis pendens*, who pending the suit purchase from a party to the suit, or derive title from one so purchasing."

We also quote the following from Wade on Notice, section 360 :

“This doctrine, being originally invoked by courts of equity, rather as a measure of necessity, to prevent a failure of justice, than on account of its consistency with abstract justice, and being employed to restrain mere strangers from coming in *pendente lite*, by acquiring an interest in the subject of litigation, the courts have uniformly refused to extend its provisions to others who were not *purchasers* in the strict sense of the term. It will, therefore, not affect either mortgagees, whose securities are prior to the suit, or to the holders of antecedently acquired interests in the property.”

Among many authorities in point the respondent refers us to the following: *Hammond v. Paxton*, 58 Mich. 393; *Parks v. Jackson*, 11 Wend. 442; Freeman on Judgments, §§ 191 to 201 and cases; Wade on Notices, 337 *et seq.*; *Jackson v. Dickinson*, 15 Johns 309; *Parker v. Conner*, (note) 45 Am. Rep. 187; *McIlwrath v. Hollander*, (note) 39 Am. Rep. 486. In the two cases last referred to in the Am. Rep., there are very complete and satisfactory notes upon this subject.

The result of our inquiry is that we are of opinion that the conclusions of law by the district court are fully sustained by the findings of fact and the admissions of the pleadings. The evidence is not brought up and no question is made as to the findings being sustained by the evidence.

Judgment is therefore sustained.

Affirmed.

HUNT, J. concurs. PEMBERTON, C. J. not sitting.

STEELE, PLAINTIFF, v. GILPATRICK, AS REGISTRY
AGENT OF REGISTRATION DISTRICT NO. 1, DEFENDANT.

[Submitted July 1, 1896. Decided July 18, 1896.]

18	453
21	238
18	453
23	117
18	453
24	275

ELECTIONS—*Sections of Political Code in force controlling registration, enumerated.*—Sections 1200, 1206, 1211, 1212, 1218 to 1221, inclusive and 1224 to 1234 inclusive of chapter 3, Part III, title II of the Political Code, pertaining to the registration of voters, held in force.

SAME—*Registration offices—Time for opening.*—The time for opening registration offices is controlled by the provisions of section 1227, chapter 3, Part III, title II of the Political Code, and the registration of electors, as therein provided, may not lawfully begin before the second Tuesday of October preceding any general election.

SAME—*Registration certificates.*—Section 1233, *Id.*, prohibiting registration and voting in any county other than the one in which the elector actually resides at the time of his registration or in which he will have actually resided for thirty days before election day, is controlling as to the character of registration certificates permitted to be issued by registry agents.

ORIGINAL PROCEEDING. Action to enjoin opening of a registration office prior to the second Tuesday of October, 1896. Writ issued.

Statement of the case by the justice delivering the opinion.

Original proceeding. The plaintiff brings this action as a taxpayer to enjoin the defendant, a duly appointed registry agent for registration district No. 1, within and for the county of Lewis and Clarke, from opening his registration office on any date before the second Tuesday of October, 1896, or from registering the names of qualified electors before said date, and to restrain the defendant from issuing to any one any paper called a state registration certificate during his term of office—all of which acts he threatens to do in violation of law. An order to show cause having issued, the defendant appeared by general demurrer.

C. B. Nolan, E. A. Carleton and Henry C. Smith, for Plaintiff.

Henri J. Haskell, Attorney General, for Respondent.

HUNT, J.—This proceeding is brought to determine what

statutes are in force regulating the registration of voters entitled to vote at general elections to be held within the state.

The original registration law was enacted in 1889. (*Laws Sixteenth Session*, page 124.) To remedy inconveniences and defects, made plain by practical operation of the law, in 1893 the legislature made a number of material amendments to several of the provisions of the act of 1889. (*Laws of Montana, Third Session*, page 78.) Between the date of the passage of the law of 1889 and the amendments of 1893, the code commission reported for adoption the Political Code, which included substantially the law of 1889. This reported code was substantially adopted by the legislature on February 25, 1895. Then there were several new statutes pertaining to registration passed in 1895.

In the codes as published (*Montana Codes Annotated*, 1895) the chapter pertaining to the registration of voters is very confusing. (Chapter 3, § 1200 *et seq.*, Political Code.) It apparently contains all the laws passed upon the whole subject of registration, that is the act of 1889, the amendatory act of 1893 and the new acts of 1895.

As there is an entire irreconcilability between many of the provisions of the chapter as published, we have resorted to those sections of the code which lay down rules of construction to aid us in selecting the statutes which must control.

By section 5181 of the Political Code (March 13, 1895) it is expressly provided that * * "all acts of the third and fourth sessions of the legislative assembly of the state of Montana shall be and remain in full force and effect in like manner as if enacted after the adoption of the four codes, namely: The Code of Civil Procedure, the Penal Code, the Civil Code and the Political Code, notwithstanding the provisions of sections 5160 and 5161 of the Political Code, nor any provision of either of said codes to the contrary; and all acts of the fourth session of the legislative assembly amending or repealing any provision of either of said codes, shall be observed in compiling and printing thereof, so that such repealed provision shall be omitted and amendments inserted in lieu of the original provision."

It was also provided by section 5184 of the Political Code that : "If any of the acts or parts of acts herein enumerated are in conflict with, or are inconsistent with any of the provisions of the said codes enumerated in section 5183, of this act, or any of them, the acts or parts of acts herein enumerated are to be considered and construed as amendments to the respective code or codes, whose provisions they are in conflict with, or are inconsistent with, it being intended hereby that all of the acts or parts of acts herein enumerated shall be the law of the state of Montana, upon the respective subjects, so far as they are inconsistent with the provisions of the said codes, or any of them, except as herein provided."

By section 5185, approved March 13th, 1895, it was provided that if any of the acts or parts of acts enumerated in said section were in conflict with any acts passed by the fourth legislative assembly of the state, the acts passed by the fourth legislative assembly shall be considered and construed as repealing such acts, or parts of acts enumerated in said section.

By section 5186 certain acts were enumerated and declared to be in full force and effect. Included in this enumeration we find : "An act to amend an act entitled 'an act to provide for the registration of the names of electors and to prevent frauds at elections approved March 8th. 1889,' approved March 8th, 1893."

It therefore follows from these statutory rules that the laws of 1893 and the laws of 1895 are in force. If they conflict with any sections adopted as reported by the Code commission the Code sections fall ; but where there is no inconsistency, the Code sections must stand.

Without entering further into the details of the history of the several amendments, we have concluded to make the matter as plain and simple as possible by compiling the statutes now in force in the order in which they stand as published, appending to several of the provisions such brief observations as may seem appropriate in explanation thereof.

Section 1200.

Section 1209. Section 1209 is from the laws of 1895. The

oath prescribed is general in its application to persons—citizens at the time they may register—and as such must prevail. But it makes no provision for persons who have declared their intention to become citizens, but who cannot by reason of legal disqualification take out their final papers until after registration closes, but who may be able to so qualify before election day. (See note to § 1228.)

Section 1211.

Section 1212. This section is from the law of 1895, and is the provision applicable to persons fully naturalized at the time of application for registration, and as to such persons is controlling. But if a person presents himself for registration and presents his declaration of intention to become a citizen, but who by reason of legal disqualification cannot become a citizen until after registration closes and before election day, such person may be registered and is brought within the provisions of section 1230.

Section 1218.

Section 1219.

Section 1220.

Section 1221.

Section 1224.

Section 1225.

Section 1226.

Section 1227.

Section 1228. This section is from the laws of 1893. So much of it as applies to persons who are full citizens at the time of registration is included in section 1209. (See note § 1209.) But it must stand as the law governing the registration of any persons who may have declared their intention to become citizens but who, by legal disqualifications, cannot take out their final papers until after registration closes, yet who honestly intend to take out such final papers before election day. (See note to § 1209 and § 1230.)

Section 1229.

Section 1230. The object of the foregoing section (1230) was evidently to cover the few cases that might arise of per-

sons who had declared their intention to become citizens of the United States, but who could not take out their final papers until the time intervening between the close of registration and election day. Thus a man who had declared his intention to become a citizen upon the first day of November, 1894, (unless in special instances) could not take out his final naturalization papers until November 1, 1896. Registration however will close before November 1, but election day will not occur until November 3. To cover such a case section 1230 must stand. It permits the registration, provided the applicant swears that he will be entitled to become a naturalized citizen, and will become one before election day, and provided, as generally required by the registration laws, he exhibits his declaration of intention and otherwise is qualified generally to register.

Section 1231.

Section 1232.

Section 1233. The foregoing section (1233) is from the laws of 1893. By the original registration law of 1889, an elector could receive what was called a "territorial or state registry certificate" from his registry agent, and upon its exhibition to a registry agent in another district within the county in which the elector registered, *or any other county*, he could register a second time and vote. But the legislature of 1893 materially changed this provision of the law and expressly prohibited the registration or voting in any county other than the one in which the elector actually resides at the time of his registration, or in the county in which he will have actually resided for thirty days before election day. The only privilege accorded by section 1233, now in force, is that an elector who is registered may, if he moves from one election district to another *within the same county* in which he registered, vote in the district into which he has moved *in the same county*, provided, he has obtained the certificate allowed by section 1233, and provided, he presents this certificate *within the period of registration* to the registration agent within the election district to which he has moved, and pro-

vided, his name is registered the second time as required by said section. But it must be understood that under the registration law of the state now in force, there is no way whatsoever by which an elector may vote unless his name appears upon the registration books of the county in which he actually resides at the time of his registration, or in which he will have actually resided for thirty days before election day. This important prohibition also appears by section 1234, to follow. The section only gives a right in certain cases to a registered voter to vote in a district other than where he first registered. But he cannot vote under any circumstances in any county except where he first registered and lives, nor unless registered before registration closes.

Section 1234.

There are several other provisions in the chapter pertaining to registration applying to special elections held for any purpose in any county, but as they are wholly immaterial to the laws governing the registration of voters at general elections, they need not be considered.

The demurrer is therefore overruled, and it is hereby ordered that a writ issue enjoining and restraining the defendant from opening his registration office, and from registering names of electors at any time before the second Tuesday of October, 1896, and restraining him from issuing any registration certificates other than those provided for by section 1233, referred to above.

DE WITT, J., concurs. PEMBERTON, C. J., not sitting.

ROSENSTEIN, RESPONDENT, v. COLEMAN, ET AL., AP-
PELLANTS.

[Submitted July 7, 1896. Decided August 4, 1896.]

ASSIGNMENT FOR BENEFIT OF CREDITORS—Sales on credit—Validity.—An assignment for the benefit of creditors which empowers the assignee to sell and dispose of the assigned property as he may deem best, either for cash, or on time, or for credit, is fraudulent and void as to creditors.

SAME—Same—Fraudulent intent.—Section 231, Fifth Division of the Compiled Statutes making the question of fraudulent intent in all conveyances one of fact and not of law, does not preclude the court from adjudging fraudulent an assignment which on its face permits the assignee to sell on credit, since an intention to hinder, delay and defraud creditors is a necessary legal inference from a provision permitting credit sales, and is as conclusive upon the assignor as if he had in express terms admitted a fraudulent intent.

Appeal from Second Judicial District, Silver Bow County.

ACTION by assignee for conversion. Judgment was rendered for the plaintiff below by McHATTON, J. Reversed.

Statement of the case by the justice delivering the opinion.

The plaintiff, Anna Rosenstein, brought this action as the assignee for the benefit of the creditors of Isadore Rosenstein. She sued the defendants, who were, respectively, a justice of the peace and a constable of Silver Bow county. Her complaint alleged that Isadore Rosenstein assigned his stock in trade, consisting of merchandise, to her for the benefit of his creditors; that she accepted the trust and took possession, but that after the assignment and after her possession, the said constable, McNichols, levied upon and attached all of the property described in the assignment and ousted her of possession. She demanded judgment for \$2,680, the value of the articles alleged to have been wrongfully taken from her possession as assignee.

The deed of assignment is attached to the complaint, and, among other things, contains the following: "But in trust and confidence, however, to sell and dispose of the said property, real and personal, and to collect the said choses in ac-

tion, using a reasonable discretion as to the times and modes of selling and disposing of said property as the said second party may deem best, either for cash, or on time or for credit, or at public auction or private sale, and to collect the said choses in action and accounts, with the right to compound for the same, but to use all due diligence and haste in so disposing of and collecting the said property and effects to the end that the said creditors of the said first party may not be hindered or delayed in the receipt of their several claims and demands against the said first party; and to dispose of the sums of money so realized and collected as follows :''

A general demurrer was interposed by the defendants, but was overruled. Defendants answered admitting the execution of the assignment, but denying that by said instrument any title or interest vested in the plaintiff as assignee for the benefit of the creditors of Isadore Rosenstein, or otherwise; denying possession of plaintiff as alleged; denying that the instrument constituted an assignment for the benefit of creditors and denying that defendants wrongfully withhold possession. The defendants then averred that in certain actions by creditors of Isadore Rosenstein judgments were duly rendered against said Isadore Rosenstein, and that on September 9, 1893, under the authority of certain executions duly issued by the justice of the peace, the property included in the said pretended assignment was levied upon and duly sold, and the proceeds of the sale applied to the payment of the judgments of the first and second attaching creditors. It was further alleged that the said pretended assignment was made by Isadore Rosenstein with intent to hinder, delay and defraud his creditors, and was and is absolutely void, and that plaintiff never had as assignee for the benefit of the creditors of said Isadore Rosenstein any right, title or interest to the property mentioned.

The plaintiff by replication denied that the property was at the time of the levy the subject of attachment or sale, but averred that it was in possession of the plaintiff as assignee; denied that the assignment was made with intent to hinder, delay or defraud the creditors of the said Isadore Rosenstein, and denied all other averments of defendants' answer.

There was a trial before a jury, and a verdict rendered in behalf of plaintiff, assessing her damages at \$1,500, the value of the property at the time of the levy of attachments by the defendants. A motion for a new trial was overruled. The defendants appeal from the judgment and from the order overruling their motion for a new trial.

Charles R. Leonard, for Appellant.

The provision of the deed of assignment which vests in the assignee the power to sell for credit and thus enables her to delay the creditors indefinitely is conclusive evidence of fraud and therefore the assignment is void as to all creditors not assenting thereto. (*Hutchinson v. Lord*, 1 Wis. 286, 60 Am. Dec. 381; *Keep v. Sanderson*, 2 Wis. 42, 12 Wis. 391; *Barney v. Griffin*, 2 N. Y. 365; *Nicholson v. Leavitt*, 6 N. Y. 510, 57 Am. Dec. 499; *Burdick v. Post*, 6 N. Y. 522; *Rapalee v. Stewart*, 27 N. Y. 310; *Brigham v. Tillinghart*, 15 Barb. 618; *Meachem v. Sterne*, 9 Paige 405-6; *Sutton v. Hanford*, 11 Mich.; *Wilhelm v. Byles*, 60 Mich. 561; *Greenleaf v. Eades*, 2 Minn. 264; *Truit Bros. & Co. v. Caldwell*, 3 Minn. 364; *Bennett v. Elliston*, 23 Minn. 242; *Paige v. Olcott*, 28 Vt. 469; *Porter v. Williams*, 50 Am. Dec. 519; *Gates v. Andrews*, 97 Am. Dec. 764; *Gardner v. Bank*, 95 Ill. 298; *Baldwin v. Peat*, 75 Am. Dec. 806; *Sumner v. Hicks*, 2 Black, U. S. 532; *McCleery v. Allen*, 7 Neb. 21, *American Exchange Bank v. Inloes*, 7 Md. 173, 69 Am. Dec. 192; *Sprecht v. Parsons*, 25 Pac. Rep., Utah, 730.)

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W. I. Lippincott and *W. W. Dixon*, for Respondent.

To hold a power to sell on credit to be conclusive evidence of fraudulent intent, as a matter of law, would seem to be in direct violation of section 231, Fifth Division Compiled Statutes of 1887. (*Billings v. Billings*, 2 Cal. 107; *Smith v. Craft*, 123 U. S. 441; *Baldwin v. Peet*, 22 Texas 806.) The main question is discussed at length, and many of the authorities, *pro* and *con*, cited in Burrill on Assignments

(5th Ed.) sections 221 to 224. It is there shown that the courts, in a majority of the states where the question has arisen, have decided against appellants' contention here. The decisions of the New York courts are in favor of appellants' position; but in that state the contrary doctrine was originally held and had the distinguished sanction of Chancellor Walworth. (*Rogers v. De Forest*, 7 Paige, Ohio, 272.)

A sale on credit, with security and interest, will in many cases, be for the interest of the creditors, and the assignee should be allowed to exercise a reasonable and honest discretion in the matter. (*Conkling v. Conrad*, 6 Ohio St. 620.) The grant of a power to sell on credit is a very useful and frequently necessary grant and raises no presumption, conclusive or otherwise, of fraudulent intent. In addition to the authorities cited in Burrill on Assignments, section 221, on this point, see: *Christopher v. Covington*, 2 B. Mon. (Ky.) 357; *Gilmer v. Earnhardt*, 1 Jones (N. C.) 559; *Neally v. Ambrose*, 38 Mass. 185; *Berry v. Hayden*, 7 Iowa 469; *Kellogg v. Muller*, 68 Texas, 182; *Moody v. Carroll*, 71 Texas 143; *Myer v. Black*, (New Mexico) 16 Pac. Rep. 320; *Wilhoit v. Lyons*, (Cal.) 33 Pac. Rep. 325; *Peters v. Bain*, 133 U. S. 670.

HUNT, J.—The important question in this case is whether an assignment which empowers the assignee to sell and dispose of the assigned property as he may deem best, either for cash, or on time or for credit, is fraudulent and void as to creditors. The district court held it was not, and submitted the question of fraud to a jury. But after careful consideration we understand the law to be that such an instrument is fraudulent.

It is a well established principle that a debtor making an assignment can authorize no delay whatever, except such as is necessarily incident to the creation of the trust. This principle is thus stated by GARDNER, J., in *Nicholson v. Leavitt*, 2 Selden (N. Y.) 510: "It has always been understood, that where an individual has incurred an obligation to pay money, the *time* of payment was an essential part of the contract; that

when it arrived the law demanded an immediate appropriation by the debtor, of his property in discharge of his liability, and if he failed, would itself, by its own process, compel a performance of the duty. The debtor, by the creation of a trust, may direct the application of his property, and may devolve the duty of making the appropriation upon a trustee. This the law permits, and such delay as may be necessary for that purpose. But the debtor cannot in this way avoid the obligation of immediate payment, or extend the period of credit without the consent of the creditor. The attempt to do this, however plausible may be the pretense, is in conscience and in law, a fraud and nothing else." This language was approved of by the New York court of appeals in *Dunham v. Waterman*, 17 N. Y. 9.

The argument is advanced that this discretionary power vested in the assignee may result advantageously to the creditors by avoiding a sacrifice of the goods included in the assignment. This is likewise answered by the rule that the debtor cannot by any assignment avoid the obligation of immediate payment when the debt is due. He cannot without his creditors' consent extend the period of credit. Provisions, therefore, in an assignment, "by which it appears that the debtor, at the time of its execution intended to prevent the immediate application of his property to the payment of his debts, will make the instrument void as to such creditors as are hindered and delayed." (*McCleery v. Allen*, 7 Neb. 21.)

It has been further laid down that if an assignment containing a clause authorizing a sale on credit is valid, it follows that the debtor has a right to confer the power. But if the owner of the property has vested the discretion in his assignee, unless it is fraudulently exercised, "equity cannot interpolate a provision that the fund shall be disposed of and the money realized according to the discretion of the chancellor." (*Nicholson v. Leavitt*, *supra*.)

It is earnestly contended by the respondent that by section 231, Fifth Division of the Compiled Statutes, the court is precluded from adjudging the assignment fraudulent because of

the provisions on its face. This is equivalent to saying that a positive intent to defraud creditors must exist in order to make the assignment illegal, and that the statute above cited makes the question of fraudulent intent a question of fact, and not of law. We find the very same statute was in force in New York when the several decisions in that state declaring assignments which authorized sales on credit to be invalid, were rendered. (2 N. Y. Revised Statutes 137, § 4.)

It was urged in the court of errors of that state, in 1833, in the case of *Cunningham v. Freeborn*, 11 Wend. 241, that the supposed determination of the question of fraudulent intent belonged to the jury and not to the court. It was there held that in a court of equity the chancellor must determine the question upon all the facts in the case before him, whether upon complaint and answer or pleadings and proofs, and come to a conclusion such as a jury would be bound by the law to find. The court, by Nelson, J., there said : "It could never have been intended by this statute, nor could it be endured in principle or practice, that the verdict of the jury should be conclusive if against law and evidence, or that the answer of a defendant, disclaiming a fraudulent intent, though it admits facts from which such intent is a necessary or legal inference, shall still be conclusive upon the point. * * * * *

* The true doctrine on this subject, notwithstanding the statute, I apprehend, is, that if there is any provision in the deed of assignment, or any fact admitted in the answer, which is *per se* fraudulent according to the law of the case, it is so, the denial of the fraudulent intent to the contrary notwithstanding; that fraud in fact is a question compounded of law and fact, which is to be found by the jury in a court of law, under proper direction duly observed by them, and may be by the chancellor in a court of equity; that any set of facts, or any intention to be fraudulent, must be a violation of some principle of law since the revised statutes as well as before; and when the violation of the principle is admitted by the admission of the facts, the intent is the natural and necessary consequence, and the denial is senseless and idle. Where there is

no law, there is no transgression; and where the law exists and the transgression is admitted, the intent follows as a legal inference. The admission of facts which are *per se* fraudulent in judgment of law, are as much so and as conclusive upon the defendant as if he had in express terms admitted a fraudulent intent in his answer; and, in such a case, any subsequent disclaimer of such intent will not avail him. It will not be entitled to credit; neither is his disclaimer after the admission of facts which are of themselves fraudulent against creditors; for the legal intent, from these facts, is stronger than the mere admission of it subsequently denied.

There was a class of cases familiar to the profession, by which the acts of parties were pronounced fraudulent and void in law as against creditors, in the absence of any fraudulent intent, and under a concession by the courts that there was none. (3 Johns. Ch. Rep., 481; 8 Cowen's Reports, 406; 4 Wendell's Reports, 300.) The doctrine of these cases was arraigned in this court in *Jackson v. Seward*, 8 Cowen's Report, 400, and all questions of fraud were supposed to be put upon the footing of a fraudulent intent by the decision in this case. The provision of the revised statutes making all questions of fraudulent intent a question of fact, and not of law, was no doubt intended to settle definitively, by enactment, the above litigated question, and all others of a like nature. Such is the effect of the note of the revisors to this section."

In *Dunham v. Waterman*, cited above, the reasoning of Judge Nelson is regarded as "clear and conclusive." "It follows," say the court, "from the reasoning of Mr. Justice Nelson, which I regard as unanswerable, that wherever an assignment contains provisions which are calculated, *per se*, to hinder, delay or defraud creditors, although the fraud must be passed upon as a question of fact, it nevertheless becomes the duty of the court to set aside the finding, if in opposition to the plain inference to be drawn from the face of the instrument. A party must, in all cases, be held to have intended that which is the necessary consequence of his acts."

We regard the argument of the foregoing opinions as

thoroughly sound. The obvious practical tendency and operation of permitting failing debtors to give their assignees discretion to sell on credit is to abuse the confidence of creditors and to hinder and delay those who have a right to their money without any delay other than such as of course, is "incidental and necessary to the existence of the trust or the exercise of the power." *Dunham v. Waterman, supra*. If they, the creditors, wish the property sold on credit, they have a right to so determine, but the debtor or his trustee of his selection cannot take away that right. (*Barney v. Griffin*, 2 N. Y. 365.)

The Supreme Court, of Illinois, in *Bowen v. Parkhurst*, 24 Ill. 258, say there is reason in the view that the tendency and effect of such assignments is to hinder, delay and defraud creditors. "The assignment," say the court, "withdraws all the debtor's property from the reach of legal process, and leaves it where the creditors cannot reach it in any other manner than by the exercise of the discretion of the assignees. The assignee has it in his power to place the creditors at defiance, until he shall have converted the property into the means of payment at private sale on credit, on such terms as he in his judgment may deem best, and most for the interest of the parties concerned. This power to sell at private sale, on the most advantageous terms, involves a right to delay the sale as long as the assignee thinks proper. The sale may be made on any terms of credit he thinks best, and in this way the creditors may be indefinitely hindered and delayed. An insolvent debtor ought not to have the power, under color of providing for his creditors, of placing his property beyond their reach, in the hands of trustees of his own selection, and take away the right of the creditors to have the property converted into money for their benefit, without delay. They alone should have the right to determine whether the property shall be sold on credit, and any conveyance which takes away this right, ought not to be upheld; for it is a conveyance to hinder and delay creditors, and within the very teeth of the statute." (See also *Whipple v. Pope*, 33 Ill. 334; *Hutchin-*

son v. Lord, 1 Wis. 286, and *Gardner v. Com. National Bank*, 95 Ill. 298.)

Burrill on Assignments, section 190, reviews the decisions of the various states upon the question under consideration. We have examined the many cases cited in that author's text, and our opinion is that the New York, Illinois and Wisconsin decisions stand upon the sounder basis, and that the insertion of a clause, which permits the assignee to sell on credit, in its tendency and operation and effect hinders and delays creditors, and that as the assignor is in law deemed to have intended all the consequences which naturally flow from the provisions of the assignment made, the intent to hinder, delay and defraud becomes a necessary legal inference from the provision itself. (Burrill on Assignments Sec. 309.)

It is urged that the direction to the assignee to use all diligence in disposing of and collecting the property and effects to the end that the creditors * * * "may not be hindered or delayed" in the receipt of their several demands is a restriction against any abuse of power by the assignee. But if the discretionary power to sell on credit is of itself sufficient to avoid the assignment, a restriction confining the exercise of that power within the limits of due diligence to the end that creditors may not be hindered or delayed is unavailing. The power as well as the restrictions being inconsistent with the rights of creditors the trust itself falls. (Burrill on Assignments, Sec. 147.)

It is therefore ordered that the judgment of the district court be reversed, and the cause is remanded with instructions to sustain the demurrer to plaintiff's complaint.

Reversed.

DE WITT, J., concurs. PEMBERTON, C. J., not sitting.

OMAHA UPHOLSTERING COMPANY, RESPONDENT, v.
CHAUVIN-FANT FURNITURE COMPANY,
APPELLANT.

[Submitted July 8, 1896. Decided August 4, 1896.]

ATTACHMENT—Motion to dissolve—Specification of grounds.—Under section 200 of the Code of Civil Procedure (1887) providing that the defendant in attachment may apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, that the attachment be discharged on the ground that the writ was improperly issued, both the notice and motion should specifically state the grounds upon which the motion is based. The plaintiff cannot be required to resort to an affidavit filed in support of the motion in order to determine the grounds upon which the defendant may be intending to rely.

Same—Same—Merits of Action.—On motion to discharge an attachment on the ground that the writ was improperly issued, it is not within the scope of the inquiry to try the merits of the main action. (*Newell v. Whitwell*, 16 Mont. 243, cited.)

Appeal from Second Judicial District, Silver Bow County.

ACTION on account. Defendant's motion to dissolve the attachment was denied by SPEER, J. Affirmed.

Statement of the case by the justice delivering the opinion.

So far as necessary to explain the point involved in this case the following facts may be stated :

This was an action by the plaintiff against the defendant to recover the sum of \$1,823.00, alleged to be due by defendant and for goods sold and delivered by certain mercantile firms to defendant, which said firms assigned their accounts to plaintiff for a valuable consideration and before the commencement of this suit. On February 4th, 1895, an attachment was issued by plaintiff against the defendant's property. On February 13th, 1895, the defendant moved to set aside the attachment "on the grounds and for the reason as set forth in the affidavits on file in this cause and made a part of this motion, and in all papers on file, and that the writ was improperly issued."

The affidavits filed are quite lengthy, the substance of them being : that the defendant did not owe the plaintiff anything at the time of the commencement of this suit, and that John A. Shelton, Esq., plaintiff's attorney, knew that defendant

did not owe plaintiff anything at the time of the filing of the complaint in this case. Certain exhibits were attached to the affidavits of defendant, wherein the plaintiff stated that the attachment proceedings were without their knowledge, authority or sanction, and that plaintiff had bought no claims against defendant from any parties, and that they had no knowledge of the attachment proceedings. On February 13th the plaintiff filed an affidavit wherein John A. Shelton, Esq., stated that he was the attorney for the plaintiff and the parties named in the complaint, who had assigned their claims to plaintiff; that the account had been put in his hands by the various parties named in the complaint with instructions and authority to sue and secure the payment of the same by attachment or otherwise, and to unite said accounts, for the purpose of suit, in the name of any of the above named parties; that if plaintiffs' account had been paid before the commencement of this suit, affiant did not know of same; that affiant was directed by Snow, Church & Co., a collection agency of Omaha, to sue upon plaintiff's claim without an hour's delay, and that affiant was informed that a draft, signed by the Omaha Upholstering company, upon defendant after being presented to the defendant company for payment had been refused and returned to the plaintiff company.

On February 14th, 1895, the defendant filed its answer, admitting that plaintiff sold and delivered to defendant the goods as alleged in the complaint, but averring that before the commencement of this action defendant fully paid therefor. The answer denied sales by the companies alleged to have assigned their accounts to plaintiff; denied the assignments to plaintiff; and denied the debts alleged to be due from defendant to the various companies.

The district court refused to dissolve the attachment. From the order of refusal defendant appeals.

Chas. O'Donnell, for Appellant.

John A. Shelton, John F. Forbis and T. J. Walsh for Respondent.

HUNT, J.—Section 200, of the First Division, Code Civil Procedure, 1887, provides that the defendant may apply on motion, upon reasonable notice to the plaintiff, to the court in which the action was brought, that the attachment be discharged, on the ground that the writ was improperly issued. A motion made under this statute should state specifically the grounds upon which the motion is based; so should the notice of motion to discharge the attachment. The object of such specifications is to give information to the adverse party of the particular nature of the objections to be made to the writ. As was recently said by the supreme court of Utah, in *Cupit v. Park City Bank*, 37 Pac. 564 :

“The provision in the statute prescribing that notice may be given of the motion ‘on the ground that the same (the writ) was improperly or irregularly issued’ is only a provision that, wherever the writ is improperly issued, that fact will authorize this application to discharge. It is like a great variety of provisions indicating the general ground or reason upon which parties may proceed, or the action of the court may be based, and which are never held to obviate the necessity of specifying the points of objection upon which the moving party may rely. If the point be stated, it may be possible for the opposite party to answer it, and the object of the rule is to give him a fair opportunity to do so.”

It is laid down by Drake on Attachments, section 415, that the motion must specify the grounds upon which it is made. “It is not sufficient to say that it is made because the writ was improperly issued; there must be a statement of the points of the objection upon which the moving party will rely.”

In *Freeborn, Goodwin, et al. v. Glazer*, 10 Cal. 337, the notice of motion to discharge the writ of attachment stated that the motion would be made “because the said writ was improperly issued.” This was held to be defective. Upon a rehearing of the case it was decided, under the provision of the California laws (Section 138, General Laws of California, by Hittell,) which section is like section 200 of the Montana

Code, cited above, that the provision did not obviate the necessity of specifying the particular points of irregularity upon which the motion to discharge would be made. "If the point be stated," said the court, "it may be possible for the opposite party to answer it, and the object of the rule is to give him a fair opportunity to do so." This rule was followed in *Loucks v. Edmondson*, 18 Cal. 203, and in *Donnelly, et al. v. Strueven*, 63 Cal. 182. In this latter case, the court, citing section 556 of Harston's Code of Civil Procedure of California, which is (so far as the point under discussion is affected) almost identical with section 200 of the Montana Code of 1887, affirmed the rule that a defendant applying to have a writ of attachment discharged, shall state in his notice the particular ground upon which he relies.

The counsel for appellant in the case at bar tells us that the statutes of California at the time of the decision in *Donnelly v. Strueven*, required the notice to state the particular ground relied upon; but in this respect the counsel is in error. This argument of the inapplicability of the California statute to the Utah statute, section 3326 Compiled Laws of Utah, which is like section 200 of the Montana Code, was advanced to the supreme court of Utah upon the rehearing of *Cupit v. Park City Bank*, cited above. See same case 40 Pac. 707. But in the opinion upon the rehearing, the incorrectness of the contention was clearly demonstrated by Justice King, who said, after citing the various statutes of California: "It will thus be seen that the statute of California, so far as it concerns the questions involved in this case, is the same as ours, and was at the time the cases above referred to were decided. (*Cupit v. Park City Bank*, 40 Pac. 707.)

Wade on Attachment, section 292, states the rule in this language: "The matter first in time as well as importance, to bring the regularity of proceedings before the court on a motion to discharge the attachment, is *notice*. This is requisite under the practice of all the states, whether at common law or under the Codes. And the notice, in order to serve its purpose, should not only state that a motion will be made to

discharge the attachment, or quash the writ, giving the time when such motion will be called up, but it must state the particular grounds upon which the dissolution of the attachment will be asked. Under a statute which provided that the defendant might at any time before answering, "apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, or to a county judge, that the attachment be discharged, *on the ground that the writ was improperly issued,*" it was held that the notice must contain a more specific statement of the grounds than that embraced in the words of the quotation in italics. This was only regarded as a provision that, whenever the writ was improperly issued, that fact would authorize the application for its discharge. The notice, in specifying the grounds of the motion, should state wherein it would be urged that the writ was improperly issued."

The very latest author to which we have access says that the motion papers of the party applying for dissolution of an attachment must specify the grounds he relies upon therefor, and that the irregularity or insufficiency must be clearly pointed out. (Shinn on Attachment and Garnishment, section 347.)

In *Vaughn v. Dawes*, 7 Mont. 360, it was held that the assignment of the reasons for discharging the attachment should be definitely and specifically designated.

The appellant argues that we should resort to the affidavits he has filed for the specific ground relied upon. But the authorities cited clearly hold that the notice of motion, and the motion, must specify the grounds upon which the party moving to dissolve, relies, and it would be unreasonable, we think, to compel a party to pick out such portions of lengthy affidavits as may perhaps state certain grounds upon which his adversary intends to rely. He should not be compelled to do so. It is the duty of the party who seeks to have the attachment discharged to state his grounds, and if he fails to do so, the court will disregard his motion.

From the foregoing views it follows that the notice of

motion, and the motion in this case, are fatally defective. We will say, however, that it appears by an examination of the affidavit that the material issue raised on the motion to dissolve was whether the defendant owed a part of the amount claimed by the plaintiff, and whether another portion of the indebtedness claimed by the plaintiff was due. This was also the principal issue for trial under the pleadings. If we are correct in this statement of the issue presented by the affidavit and by the pleadings, the court ought not to have dissolved the attachment, for under the motion to discharge an attachment on the ground that the writ was improperly issued, it is not within the scope of the inquiry to try the merits of the main action. (*Newell v. Whitwell*, 16 Mont. 243.)

The order overruling the defendant's motion to dissolve the attachment is affirmed.

Affirmed.

DE WITT, J., concurs. PEMBERTON, C. J., not sitting.

THE STATE OF MONTANA EX REL. R. C. WALLACE ET
AL., RELATORS *v.* THE STATE BOARD OF EQUAL-
IZATION OF THE STATE OF MONTANA,
RESPONDENT.

18	473
24	156
24	158
18	473
32	487

[Submitted September 9, 1896. Decided September 28, 1896.]

TAXATION—State Board of Equalization—Power to raise valuation—Constitutional law—
Under section 15, Article XII of the constitution, designating the officers who shall constitute the State Board of Equalization and providing that the duty of the board shall be "to adjust and equalize the valuation of the taxable property among the several counties of the state," such board has no power to increase the total valuation of the property of the state as disclosed and fixed by the abstracts and statements transmitted to it by the assessors and county boards of equalization.

ORIGINAL PROCEEDING.—Application for a writ of *certiorari* to review the action of the State Board of Equalization, consisting of the governor, secretary of state, state treasurer, state auditor and attorney general, in increasing the total val-

uation of property returned to it by the assessors and county boards of equalization of the several counties.

Statement of the case by the justice delivering the opinion.

The relators are resident taxpayers in the state of Montana. The respondent, the State Board of Equalization, is composed by law of the state officers above named. It is charged in the application of relators that the respondent at its session held under the law at the state capital, in July last, assumed to exercise and did exercise the power to adjust the taxable property of the several counties of the state as to the valuation thereof among the several counties of the state, and made certain changes and increased in the valuation and assessment of the real and personal property as returned and transmitted by the assessors and county boards of equalization of the several counties, which said changes and increases are specifically set forth in relator's application, and that by reason of such changes and increases the respondent increased the valuation and assessment of divers classes of property in the several counties of the state, and that by reason of such changes and increases said board increased the aggregate total of all the values of property in the several counties of the state from the sum of \$111,084,350, which was the total value of property as disclosed by the abstracts and statements transmitted to and received by said board from the county boards of equalization and assessors, to the sum of \$114,231,730.04 which was an aggregate increase of the total assessed valuation of all the property in the several counties of the state, as shown above, of \$3,147,370.04. The facts as alleged in the application are not denied by respondent's return.

Carpenter & Carpenter and Toole & Wallace, for Relators.

Henri J. Haskell, Attorney General, for Respondent.

PEMBERTON, C. J.—The principal question presented for adjudication is as to the power of the State Board of Equal-

ization under our constitution to so increase the valuation of property returned to it by the assessors and county boards of equalization of the several counties as to increase or decrease the total valuation of property of the state as fixed by the county boards and assessors. The relators contend that under the constitution of the state the respondent board had no power to make such change and increase in the total valuation of the property of the state. Sec. 15, Article XII, of our constitution is as follows:

“The governor, secretary of state, state treasurer, state auditor and attorney general shall constitute a state board of equalization, and the board of county commissioners of each county shall constitute a county board of equalization. The duty of the state board of equalization shall be to adjust and equalize the valuation of the taxable property among the several counties of the state. The duty of the county boards of equalization shall be to adjust and equalize the valuation of taxable property within their respective counties. Each board shall also perform such other duties as may be prescribed by law.”

We have been unable to find a constitutional provision exactly like ours in any of the states. The constitution of the state of Colorado contains provisions upon this subject so nearly like ours that it may be fairly claimed that they are *substantially* the same. In fact it seems from their substantial similarity that our state may be said to have adopted the Colorado constitution upon this subject. Sec. 15, Article X, of the Colorado constitution is as follows :

“There shall be a state board of equalization consisting of the governor, state auditor, state treasurer, secretary of state and attorney general ; also in each county of this state, a county board of equalization, consisting of the board of county commissioners of said county. The duty of the state board of equalization shall be to adjust and equalize the valuation of real and personal property among the several counties of the state. The duty of the county board of equalization shall be to adjust and equalize the valuation of real and personal property within

their respective counties. Each board shall also perform such other duties as may be prescribed by law."

It will be observed that the only difference in the phraseology of the two constitutional provisions quoted is found in the use of these words: Where our constitution uses the words "taxable property," the Colorado constitution uses the words "real and personal property." The supreme court of Colorado in *The People ex rel. Crawford v. Lothrop*, 3 Col. 428, an elaborate and well considered case, involving the powers of the state board of equalization under the provision of the constitution just quoted, said:

"The purpose of the creation of this board is imported in its title; its duties, as stated in terms in the constitution, are to '*adjust and equalize* the valuation of real and personal property among the several counties of the state.' Perfect equality in the assessment of taxes is unattainable, approximation to it is all that can be had.

The object of the provision is to apportion as equitably as may be the burthen of the state government among the several counties, to prevent a disproportionate share of the state tax from being thrown upon any county or counties by reason of the action of the local assessors. The grossest inequality might prevail in the valuations in the different counties, and possibly with reference to escaping a fair proportion of the state tax, and without a power lodged somewhere to adjust and equalize the several county valuations, the greatest injustice might be done and there would be a practical annulment of the constitutional provision that 'all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.' It was to meet this difficulty and accomplish this end that the state board of equalization was created with powers to *adjust and equalize*."

The court then proceeds to discuss the duties and powers of assessors and county boards of equalization under the constitution and laws of Colorado, which are very similar to ours, and say:

"Section 38 (General Laws, p. 754) provides that the county

commissioners of each county shall constitute a board of equalization for the correction and completion of the assessment rolls, with power to supply omissions in the assessment rolls, and for the purpose of equalizing the same, to increase, diminish or otherwise alter and correct any assessment or valuation. It provides in case of change of the assessment of any taxpayer, that he shall be notified and have a hearing before the board. It constitutes them a *quasi* court to hear any and all complaints of the taxpayer touching the valuation or listing of his property, with full power to adjust and correct the assessment roll as in their judgment they may deem proper and right, thus adding statutory duties to their constitutional duties 'to adjust and equalize.' Other sections of the law might be cited, but those mentioned suffice for our purpose. We find here a complete system with well defined and minutely prescribed rules and regulations guarding the property right of the citizen; guarding equally the revenue necessities of the state, acting through the instrumentalities of owners and the assessors chosen by the electors of the several counties listing, valuing and returning taxable property under the sanction of an oath, with the board of county commissioners acting as a board of appeal and review, all for the one purpose of ascertaining, determining and fixing the value of taxable property in each county of the state as a basis of taxation. The statute provides for the transmission of these assessment rolls of the county to the board of equalization and contemplates that one assessment shall be made for both state and local taxes.

"The only exception to this that we find is the express provision for the assessment of railroad property by the state board of equalization. For this, in the opinion of the legislature, there was, doubtless, an obvious necessity and authority, found in the last clause of section 15, article X of the constitution, which provides that the board shall perform such other duties as shall be prescribed by law. The assessor is thus made an integral part of the revenue system which not only thus specifies and defines his duties, but assigns to other officers and

boards equally well-defined and separate duties. The assessor shall list and value. The board of commissioners shall equalize, adjust, increase and diminish, supply omissions and correct errors and hear complaints. The county clerk shall prepare assessment rolls and compute and extend the tax therein. The state board of equalization shall adjust and equalize valuations, and lastly, the county treasurer shall collect the tax. In seeking for legislative intent, reference must be had not only to the form and phraseology of the particular section under consideration; but any part must be viewed in connection with the whole, so as, if possible, to harmonize and give effect to the whole.

“Looking then to the provisions of the constitution and the statute, we are clearly of the opinion that the power to fix and determine the valuation of taxable property is lodged by them in the assessor and the board of county commissioners of the several counties of the state, and that when they have under the law performed this duty and exercised this power, that the sum of the valuations of the several counties so by them found must be taken as the aggregate valuation of all the property in the state, and is conclusive and final as against the state board of equalization. The state board may, for the purpose of adjusting and equalizing, increase the aggregate valuation of one county, and decrease the aggregate valuation of another, but they have no power to increase the sum of all the valuations of the several counties of the state. The aggregate valuation has been found for them, and fixed by the authority and in the mode prescribed by law. This view is not only sanctioned by the force of the general provisions of the statute considered as a whole, but also by the phraseology of the sections under consideration. The board is to adjust and equalize the valuation. This term *valuation* here imports values already estimated and fixed and must be referred for the measure of its force and meaning to the mode prescribed by law for estimating and fixing valuations. The aggregate material with which the board can deal is thus limited; they may adjust and equalize it among the several counties, but they cannot add to its volume.”

Section 9, article XII of our constitution is as follows :
“The rate of taxation of real and personal property for state purposes in any one year shall never exceed three (3) mills on each dollar of valuation; and whenever the taxable property in the state shall amount to one hundred million dollars (\$100,000,000), the rate shall not exceed two and one-half ($2\frac{1}{2}$) mills on each dollar of valuation; and whenever the taxable property in the state shall amount to three hundred million dollars (\$300,000,000), the rate shall never thereafter exceed one and one-half ($1\frac{1}{2}$) mills on each dollar of valuation; unless a proposition to increase such rate specifying the rate proposed and the time during which the same shall be levied, shall have been submitted to the people at a general election, and shall have received a majority of all the votes cast for and against it at such election.”

Section 11, Article X of the Colorado constitution reads as follows : “The rate of taxation on property, for state purposes, shall never exceed six mills on each dollar of valuation; and whenever the taxable property within the state shall amount to one hundred million dollars, the rate shall not exceed four mills on each dollar of valuation; and whenever the taxable property within the state shall amount to three hundred million dollars, the rate shall never thereafter exceed two mills on each dollar of valuation, unless a proposition to increase such rate, specifying the rate proposed, and the time during which the same shall be levied, be first submitted to a vote of such of the qualified electors of the state as in the year next preceding such election shall have paid a property tax assessed to them within the state, and a majority of those voting thereon shall vote in favor thereof, in such manner as may be provided by law.”

Commenting on this section of the constitution of Colorado, the supreme court in the case of *Crawford v. Lothrop*, *supra*, says : “If this claim of power on behalf of the state board to increase the valuation be admitted, why limit in the constitution the per cent. that it may levy? It matters little whether the limitation be one mill or ten, if increase of valua-

tion be unrestrained. Limited upon the one hand, it is unlimited upon the other. We may neither calculate its extent nor challenge its pretensions. Over five million dollars increase this year—it may be over fifty million dollars increase the next.

“Under this construction of the statute the efforts of the people to establish and maintain legitimate restraints on the power to tax will have been unavailing, and the checks and guards which they have embodied in their constitution to that end, cease to be of practical force or value. The spirit of the law and not ‘the letter which destroys’ must prevail. We cannot believe that any such grant of power to the state board of equalization was within the intent of the legislative authority.

“We are, therefore, of the opinion that the board of equalization in making the increased valuation acted without authority of law, and that their action in this respect is void.”

These comments by the Colorado court upon the constitutional restrictions placed upon the powers of the state board of equalization of that state apply with exactness and force to our constitution and the powers of the respondent board thereunder. We think the authority quoted above is absolutely decisive of the case at bar.

We, therefore, are of the opinion that the respondent board in increasing the total valuation of the property of the state as disclosed and fixed by the abstracts and statements transmitted to it by the assessors and county boards of equalization, acted without authority and that its action in this respect was and is wholly void.

Having reached this conclusion upon the main question involved in the case, we deem it unnecessary to pass upon the power of the respondent board to increase or decrease the valuation of any specific class or classes of property from that fixed by the county boards and assessors, as shown by the county abstracts and statements transmitted to the state board. It may not be out of place, however, to say that we think the weight of authority is decidedly against the exercise of such right or power by the state board. (*Crawford v. Lothrop*,

supra; *Wells, Fargo & Co. v. The State Board of Equalization*, 56 Cal. 194; *St. Joseph Lead Co. v. Simms*, 108 Mo. 222.)

It is therefore ordered that the proceedings of the state board of equalization be annulled as prayed for in the application of relators.

DE WITT and HUNT, JJ., concur.

THE STATE OF MONTANA EX REL. BARTLETT,
SPECIAL ADMINISTRATOR, v. THE SECOND JUDICIAL DISTRICT COURT, RESPONDENT.

[Submitted September 14, 1896. Decided September 28, 1896.]

DISTRICT COURT—Probate jurisdiction.—The jurisdiction of the district court, sitting in probate matters is limited to the powers conferred upon it by statute. (*In re Higin's Estate*, 15 Mont. 474; *Chadwick v. Chadwick*, 6 Mont. 566, cited.)

SPECIAL ADMINISTRATOR—Payment of claim against estate.—The functions of a special administrator being limited by sections 2500, 2504 of the Code of Civil Procedure, to the exercise of powers necessary to collect and preserve the estate for the executor or administrator to be regularly appointed, an order by a district judge directing a special administrator to pay an indebtedness of the estate, is void.

SAME—Same—Section 2623, Code of Civil Procedure, construed.—Section 2623 of the Code of Civil Procedure, being part of the chapter entitled "claims against the estate" and providing that "if there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court or judge, pay the amount then accumulated and unpaid at any time when there are sufficient funds properly applicable thereto," relates to the payment of claims during the regular course of administration and does not authorize an order directing the payment of a claim by a special administrator.

SAME—Same—Order to pay claim—Review on certiorari.—An order of the district court directing the payment by a special administrator of an indebtedness of the estate, being without jurisdiction, is reviewable on *certiorari*.

SAME—Same—Beneficial interest of relator—Certiorari.—A special administrator is a party beneficially interested in an application for a writ of *certiorari* to review an order of the district court, made without jurisdiction, under the terms of which he would be obliged to pay to a creditor of the estate money which he had collected and ought to preserve for the general administrator.

ORIGINAL PROCEEDING. Application for a writ of *certiorari* to review an order of the district court directing the relator as special administrator to pay an indebtedness of the estate.

Statement of the case by the justice delivering the opinion.

18	481
91	906
18	481
22	415
18	481
24	13
24	499
18	481
25	88
18	481
27	495
18	481
29	87
29	156
29	287
18	481
31	616

H. R. Bartlett, special administrator of the estate of John F. Kelly, deceased, petitions the court to issue a writ of review commanding the district court of the Second judicial district to certify to this court a transcript and record of the proceedings considered by said district court in the matter of the estate of said John F. Kelly, deceased, and the petition of Mary Ellen Kelly for an order directing the special administrator to pay the indebtedness of the First National Bank of Butte, and the order of the district court directing the payment thereof. The petitioner alleges that the district court had no jurisdiction or authority to make the order directing the special administrator to pay the indebtedness of said bank. The affidavit of H. R. Bartlett sets forth that he is the special administrator of the estate of John F. Kelly, deceased; that said Kelly died on April 16th, 1896; that on April 18th, 1896, affiant offered for probate in said district court a document purporting to be the last will and testament of said deceased, and dated April 16th, 1896, wherein deceased made bequests to various relatives amounting to the sum of \$22,000 and bequeathed the residue of his estate to his widow and minor child; that on April 18th, 1896, the district court duly made an order appointing this petitioner special administrator to collect and take charge of the estate and exercise such other powers as might be necessary for the preservation of the estate, and to do such further acts as might be ordered by the court; that bonds were given and approved; that on April 29th, 1896, the said Mary Ellen Kelly, the wife of the deceased, for herself and as guardian of her minor child filed objections and contest to the probate of the document purporting to be the last will and testament of the deceased. Petitioner also avers that the petition for probate and the contest are still pending and undetermined; that, as special administrator, he proceeded to take charge of and collect the property and effects of the deceased and realized the sum of about \$83,000, which he still has on hand.

On August 3d, 1896, the said Mary Ellen Kelly filed in the district court a petition setting forth, among other things, that

the special administrator was in possession of about \$90,000, and that the estate was indebted to the First National Bank of Butte in the sum of \$67,000, which was drawing interest at the rate of ten per cent. per annum and secured by first lien upon the real property belonging to the estate; that no claim had been presented by the bank for said sum, but she prayed for an order directing the special administrator to pay out of the funds then in his hands the indebtedness so owing to the bank together with accrued interest.

On August 5th, 1896, the special administrator filed his answer to the petition of the widow, saying that he had no knowledge of the indebtedness to the bank for the reason that no claim had been presented therefor and that he was informed and believed that there were a great many claims and demands against the estate, but could not state the nature, character or amount thereof. He also set forth other matter in his answer much of which is immaterial to the question raised by this proceeding.

It is averred that on August 11th, 1896, the judge of the district court at chambers made an order wherein the court found that the estate was indebted to the First National Bank of Butte in the sum of \$69,381.37, which was interest bearing and secured by deed of trust and was a first lien on the real property belonging to the estate. The court also found that the estate was solvent and that the assets were sufficient to pay all the debts and liabilities of the estate.

The Hon. John J. McHatton, judge of the Second judicial district court, for his return makes a transcript of the record and proceedings used and considered by him. His return sets forth the petition of Mary Ellen Kelly praying for an order requiring the special administrator to discharge the debt due the First National Bank; the special administrator's answer is also part of the return. The order appointing H. R. Bartlett special administrator recites that as special administrator he is ordered "to collect and take charge of the estate of the deceased in whatever county or counties the same may be found, and to exercise such other powers that may be necessary for

the preservation of the estate, and to do such further acts as may be ordered by the court," etc. It appears that the judge heard testimony before he made the order directing the special administrator to pay the indebtedness of the First National Bank. The cashier of the bank was called and permitted to testify in relation to the indebtedness against the objection of the special administrator. The basis of the objection was that the court had no power to receive proofs of claims by oral testimony and no authority to order the special administrator to pay the debts of the deceased. It appears also by the return that contests were filed to the probate of the document purporting to be the last will of said John F. Kelly. The order of the court embracing the findings as to the condition of the estate and the amount due to the First National Bank and directing the special administrator to pay the bank is also included in the return.

The respondent moved to quash the writ issued upon the grounds that there is an appeal from the order complained of, and that it does not appear from the record that the application was made on the affidavit of a party beneficially interested.

J. W. Forbis, for Relator.

Thompson Campbell and *William Scallon*, for Respondent.

HUNT, J.—It has been established by the decisions of this court that the jurisdiction of the district court sitting in probate matters is limited to the powers conferred upon it by statute, that is, to the control of the "administration of decedent's estates, the supervision of the guardianship of the infants, the control of their property, the allotment of dower and other powers pertaining to the same subject." (*In re Higgins' Estate*, 15 Mont. 474; *Chadwick v. Chadwick*, 6 Mont. 566.) If, therefore, there was no authority of statute for the district judge to authorize the payment of the debt due by the Kelly estate to the bank, the whole proceeding directing such payment was void, and the writ should issue.

The powers of a special administrator are limited. He is "to collect and take charge of the estate of the decedent * * * and to exercise such other powers as may be necessary for the preservation of the estate." (§ 2500, Code of Civil Procedure.) Again, the statute authorizes him to collect and preserve for the executor or administrator all incomes, rents, issues and profits, claims and demands of the estate; he must take charge and management of, enter upon and preserve from damage, waste and injury the real estate, and for any such and all necessary purposes may commence and maintain or defend suits and other legal proceedings as an administrator. He may sell perishable property in certain instances, and "exercise such other powers as are conferred upon him by his appointment, but in no case is he liable to an action by any creditor." (§ 2504, Code of Civil Procedure.) These statutes limit the functions of a special administrator to the exercise of powers necessary to collect and preserve the estate for the executor or administrator to be regularly appointed. The enumeration of particular powers such as to sell such perishable property as may be ordered sold, and to collect rents, etc., is but to enable a special administrator to collect and preserve what otherwise might not be collected and preserved for the estate by any one in authority. The authority "to exercise such other powers as are conferred upon him by his appointment" is but a further power to do what may be necessary to collect and preserve; it is not a power to exercise the powers and duties conferred upon a regular executor or administrator such as the allowance or payment of claims. "The paramount duty of this special administrator is to collect all the personal estate of the deceased, and preserve the same for the general executor or administrator, when appointed." (Schouler on Executors and Administrators, § 135; Crosswell on Executors, § 223; *Long v. Burnett*, 13 Iowa 28; *Henry v. Superior Court*, 93 Cal. 569.)

The provision of the statute that in no case is a special administrator liable to an action by any creditor on a claim against the estate confirms the view just taken. He cannot be

sued upon a claim. If he cannot be sued, plainly he cannot reject a claim, otherwise a creditor would be remediless where a special administrator might unjustly reject a creditor's claim. (*In re Sackett*, 73 Cal. 300; *Pickering v. Weiting*, 47 Iowa 242.)

It is contended that the court was authorized to make the order under § 2623, Code of Civil Procedure, which is as follows: "If there be any debt of the decedent bearing interest, whether presented or not, the executor or administrator may, by order of the court or judge, pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid."

But we think that this statute is part of the method of administration governing general administrators. It is appropriately placed in the chapter entitled "Claims against the estate," and has relation to the payment of claims during the regular and orderly administration of estates, and not to the duties of a special administrator to whom claims need not even be presented. It is, therefore, unnecessary to discuss the powers of a general administrator under the statute quoted.

It is argued that the relator has a remedy by appeal and therefore is not entitled to the writ prayed for. But inasmuch as the court had no authority to direct the special administrator to pay the debt ordered to be paid, the order of payment was made without the jurisdiction of the court and is subject to review and annulment in this proceeding.

It is also contended that the relator does not appear to be a party beneficially interested and therefore is not entitled to the writ. (§ 1942, Code of Civil Procedure.) But, as the special administrator is authorized to commence and maintain or defend suits and other legal proceedings necessary to collect and preserve the estate, surely he should be entitled to a writ of review of an order of the district court made without jurisdiction, and under the terms of which as special administrator he would be obliged to pay to a creditor the sums he had col-

lected and ought to preserve for the general administrator or executor. We think, too, that the relator has a direct beneficial interest in this proceeding, because if he pays out the funds of the estate upon an order of the court made without jurisdiction, such an order may not protect him and he may be held personally liable on his bonds.

The motion to quash is denied and the order of the district court is annulled.

PEMBERTON, C. J., and DE WITT, J., concur.

CONGDON, RESPONDENT, *v.* OLDS ET AL., APPELLANTS.

[Submitted July 6, 1896. Decided September 18, 1896.]

PARTNERSHIP—Mining partners—Promissory note—Instructions.—In an action on a promissory note signed by one of the defendants, which signature was alleged to be a firm name under which all the defendants were operating a mine as partners, it was error to charge the jury, if effect, that if parties associate themselves together for the purpose of carrying on a business and agree to contribute funds, pay losses and share profits, such an association is a general partnership without regard to whether the business is mining or not, since the elements of a partnership stated in the instruction would exist in a mining partnership as well as in a general partnership, and the instruction withdrew from the jury the consideration of whether the defendants were a mining partnership.

SAME—Same—Instructions.—Error in such instruction would not be rendered harmless because of evidence that defendants were liable by their conduct in reference to the note, even if they were a mining partnership, since under such instruction the jury would not be required to make inquiry as to whether the facts showed that the defendants were liable as a mining partnership.

SAME—Same—Promissory note—Instructions.—Where the defendants alleged that they were not conducting the mine as a partnership at the time the note sued on was given, but that an incorporated company, of which they were stockholders, was conducting the business, a verdict for the plaintiff will not be set aside as contrary to an instruction to find for the defendants if the jury found that the corporation was conducting the business, where there was evidence tending to show that while the corporation had been formed it was not in fact conducting the business.

SAME—Evidence—Admissions of partner.—Proof of the admissions of a defendant, who was not in court, that the other defendants sustained the relation of partners to him, would not be evidence of the partnership as against the other partners. (*Wiggin v. Fine*, 17 Mont. 575, cited.)

APPEAL—Briefs—Pages of transcript.—An assignment of error as to the admission of testimony will not be considered on appeal where the appellant fails to point out the testimony in his brief by reference to the page in the transcript.

Appeal from Second Judicial District, Silver Bow County.

ACTION on promissory note. Judgment was rendered for the plaintiff below by McHATTON, J. Reversed.

Statement of the case by the justice delivering the opinion.

The plaintiff and the defendant Olds together signed a promissory note payable to the Silver Bow National Bank of Butte. After renewals of the note, the plaintiff was obliged to pay the same. He then brought this action against all these defendants. The reason for joining these defendants other than Olds, was that plaintiff claimed, and so alleged in his complaint, that when the note was signed, the defendant Olds, together with defendants Hoffman, Northrup, Cox, Kountz, Whitefoot, Ferris, Cooper and Hartman, constituted a partnership, which partnership was engaged in the business of operating the Kitty Morris mine, and that the partnership was carried on in the firm name of "L. B. Olds," and that the signature of "L. B. Olds" on the note in question was not the individual signature of Mr. L. B. Olds, but was the signature of said partnership. Upon this theory the case was tried. The plaintiff recovered judgment. The defendant Olds did not appear upon the trial, and the case proceeded as against the defendants other than him. Those defendants now appeal from the judgment, and from the order denying a new trial.

Hartman Bros. & Stewart and Smith & Word, for Appellants.

F. T. McBride, for Respondent.

DE WITT, J.—There are three alleged errors complained of which we shall treat. The first is the action of the court in treating the partnership as a general or trading partnership. This matter arose in several ways upon the trial and in the giving of the instructions. It is not necessary to follow this error into every place where it occurred. It is sufficient to treat it as it occurred in instruction No. 3, which the court

gave. That instruction is as follows: "The court instructs the jury that where several parties associate themselves together for the purpose of carrying on a business and mutually agree to contribute funds for and to bear losses and share the profits of the business, that such an association constitutes a general partnership, and it is immaterial whether the business to be engaged in is mining or other business, and in such cases each partner becomes the agent of the partnership for the purpose of the partnership."

The appellants complain that by this instruction the court treated the partnership of the defendants as absolutely a general or trading partnership, and excluded from consideration the question of whether the defendants were a mining partnership. They contend that the court proceeded upon the theory that there was no such thing as a mining partnership in this state prior to the enactment of the Civil Code of July 1, 1895, sections 3350 *et seq.* If this were the case it was error, for mining partnerships differing from general partnerships have been recognized in the decisions of this court as existing in this state for many years. (*Nolan v. Lovelock*, 1 Mont. 227; *Boucher v. Mulverhill*, 1 Mont. 306; *Hirbour v. Reeding*, 3 Mont. 15; *Southmayd v. Southmayd*, 4 Mont. 112; *Galigher v. Lockhart*, 11 Mont. 113; *Harris v. Lloyd*, 11 Mont. 406; *Anaconda Copper Mining Co. v. Butte & Boston Mining Co.*, 17 Mont. 523.)

Respondent also contends that the court properly gave this instruction for the reason that it appears from the evidence that there was no mining partnership in this case. We think that there was evidence tending at least to show that the partnership in question was a mining one and not a general one. But the court instructed the jury, in No. 3 quoted, that, if parties associate themselves together for the purpose of carrying on a business and agree to contribute funds, pay losses and share profits, such an association is a general partnership without regard whether the business is mining or not. We are of opinion that this was not correct, for while these elements recited are those of a general partnership, they are certainly also

elements of a mining partnership. In every partnership the parties associating themselves together contribute funds and share losses and profits. One partner may make his contribution in money and another may make it in labor or in furnishing the mining premises to the partnership. One may bear the loss of money that he puts in, another may bear the loss of his time and labor which he contributes. We cannot imagine a mining partnership in which the parties do not share losses and profits. Certainly no one will enter a mining partnership with the agreement that he shall pay all the losses, nor with the agreement that his partner shall receive all the profits. The facts recited in instruction No. 3 may be those of a general partnership, but they are also part of the facts existing in a mining partnership, and it was error to hold absolutely that those facts constitute a general partnership only. It is true that a general partnership may exist, if the contract between the parties is to that effect, even if the business of the partnership is solely in mines. (*Duryea v. Burt*, 28 Cal. 569; *Settembre v. Putnam*, 30 Cal. 490; *Decker v. Howell*, 42 Cal. 636.) It is held in *Decker v. Howell*, *supra*, that an agreement to share profits and losses equally tends to prove the existence of an ordinary partnership instead of a mining partnership, but it is not there held that simply the sharing of losses and profits in itself constitutes absolutely a general partnership. The distinction between a general or trading partnership and a non-trading partnership is recognized not only in the mining states, where mining partnerships are frequent, but in other jurisdictions where non-trading partnerships other than mining ones are of frequent occurrence. Many of the rules of general partnerships obtain in mining partnerships, but the latter have other rules peculiar to themselves. Some of the great distinctions between a general partnership and a mining partnership are the questions of the *delectus personarum*, and the authority of one partner to bind the firm by the issuance of commercial paper of the firm. As to joint owners operating a mine it is said in *Skillman v. Lachman*, 23 Cal. at page 204: "They form what is termed a mining partner-

ship, which is governed by many of the rules relating to ordinary partnerships, but which has also some rules peculiar to itself—one of which is that one person may convey his interest in the mine and business, without dissolving the partnership. (*Ferreday v. Wightwick*, 1 Russ. & Mylne, 49.) Still there may be a partnership in the working of a mine subject to the rules relating to an ordinary partnership in trade. (Story on Partnerships, § 82.) And this relation of partnership may be constituted either by express stipulation or by implication deduced from the acts of the parties. (Rockw. on Mines, 575.) But in the case of an ordinary mining partnership something more will be required to raise the presumption of liability arising from persons holding themselves out to the world as partners than would be necessary in the case of an ordinary partnership. Such persons, in the absence of other circumstances, cannot fairly be presumed to have intended to render themselves liable to all the consequences of a commercial partnership.”

Mr. Justice Field said in *Kahn v. Smelting Co.*, 102 U. S. page 645: “Mining partnerships as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities; indeed, without them successful mining would be attended with difficulties and embarrassments, much greater than at present.”

The learned justice then quotes with approval *Skillman v. Lachman*, above quoted. See, also, *Quinn v. Quinn*, 81 Cal. 14; *McConnell v. St. Clair Denver et al.*, 35 Cal. 365; *Jones v. Clark et al.*, 42 Cal. 180; *Charles v. Eshleman*, 5 Col. 107; *Higgins v. Armstrong*, 9 Col. 38; *Judge v. Brushwell*, 13 Bush. (Ky.) 67; *Manville v. Parks et al.*, 7 Col. 128; *Deardorf's Admr. v. Thatcher et al.*, 78 Mo. 128; *Pease v. Cole*, 53 Conn. 53; *Bissell v. Foss*, 114 U. S. 252; Bates on Partnership, § 163, also § 14 and 329 with cases cited; Parsons on Partnership, § 37 with note; § 306 with note and § 85 and cases cited.

We are therefore of opinion that the court in giving instruc-

tion No. 3 was in error, for the reason that the elements of a partnership there recited do not in themselves absolutely constitute a general partnership.

Respondent, however, contends that if instruction No. 3 were error, it was not material, because the evidence shows that the defendants were liable even if they were a mining partnership, that is to say that their conduct in reference to this note and the money obtained thereby was such as to render them liable even as a mining partnership. But even if the evidence supports the respondent's contention in this respect, the error in instruction No. 3 was prejudicial, because it instructed the jury absolutely that the defendants were liable as a general partnership, and under such instruction the jury would not be required to make any inquiry as to whether the defendants were a mining partnership, or any inquiry as to whether the facts showed that the defendants were liable as a mining partnership.

Another alleged error is as follows: The defendants alleged and sought to prove that they were not conducting the mine as a partnership at the time this note was given, but that an incorporated company, called the Butte & Bozeman Mining Co., of which defendants were stockholders, was conducting the business. The court instructed the jury in effect that if they found that the corporation was conducting the business and not these defendants, they must find for the defendants. Appellants contend that the evidence was uncontradicted that the corporation was doing the business, and that therefore the verdict was contrary to the instructions. But we think that this contention cannot be sustained, for the reason that in our opinion there was evidence tending to show that, while the corporation had been formed, it was not in fact conducting the business. This assignment of error we are, therefore, of opinion cannot be sustained.

Appellants contend that almost, if not entirely, all of the testimony tending to establish a partnership between the defendants was that of statements made by the defendant Olds who was not in court, and made to the effect that the other

defendants did sustain the relation of partners to him. The appellants in their brief do not point out, under the rules of this court, this testimony by page in the transcript. They cannot therefore expect us to pick it out of the 300 pages of the record in this case. We will say, however, that our reading of the record discloses that there was very much testimony as to partnership other than that of the statements by Olds. If it were permitted by the district court to prove the fact of the partnership by the admissions of one of the alleged partners who was not present, this would not be evidence of the partnership as against the other partners. (Rice on Evidence, Vol. 1, pp. 444, 475, and Vol. 2, p. 1154; Greenleaf on Evidence, Vol. 1, § 177; *Wiggin v. Fine*, 17 Mont. 575.) We mention this matter, although we are not required to pass upon it, for the reason that it is not pointed out in the record as required by the rules.

For the reasons assigned the judgment and order denying a new trial are reversed, and the case is remanded with directions to grant a new trial.

Reversed.

HUNT, J., concurs. PEMBERTON, C. J., not sitting.

HASTINGS, ADMINISTRATOR, RESPONDENT, v. MONTANA
UNION RAILWAY COMPANY, APPELLANT.

[Submitted September 15, 1896. Decided October 5, 1896.]

NEGLECTANCE—Fellow servants—Railroads.—A laborer employed by and acting under the orders of a section foreman on a railroad, who is injured by the negligence of the foreman in not warning him of the approach of a yard engine, and the negligence of the engineer of the yard engine in operating his engine at dusk without using the whistle or bell and without a headlight, is a fellow servant with such foreman and engineer, and therefore the railroad company is not liable for the injuries resulting from their negligence. (*Goodwell v. Montana Central Railway Company*, ante, 298, cited.)

Appeal from Second Judicial District, Silver Bow County.

ACTION for damages for personal injuries. The cause was

18	493
19	120
18	493
24	100
18	493
232	78

18	493
141	154

tried before McHATTON, J. Plaintiff had judgment below. Reversed.

George Haldorn, for Appellant.

Carroll & Leehey, for Respondent.

HUNT, J.—Tim Hastings, the plaintiff's intestate, was a day laborer employed under a section foreman to keep portions of the roadbed of the defendant company in repair. The foreman had power to employ and discharge the men and superintend their work, and himself worked with the men. The foreman employed the deceased, who, with a gang of five others, was working upon defendant's road upon the day he was killed. On November 23, 1893, at dusk about twenty-five minutes past five o'clock in the evening, the deceased and five others were repairing a track near the Parrot smelter at Butte. They had with them a low, flat push car, with handles extending beyond the ends. About quitting time, the foreman told the men to move the car from the track and carry it across to another track about fifty feet away. Observing an engine on the track which the men had to cross, the foreman remarked that there was time enough to get over and ordered the men to pick up the car and proceed. The deceased had hold of the center of this push car, on the north side; the other men holding the respective corners. Before the men got it clear of the second track one corner of the flatcar went down; the deceased was on the side that went down. Just then a locomotive came up behind the men; no bell was rung and no whistle blown. One of the men was knocked down, and Hastings, the deceased, was run over, dragged beneath the engine and so seriously injured that he died shortly afterwards.

The complaint alleged negligence in the following respects, viz: That the defendant was negligent and careless through its engineer and fireman of the yard engine in operating such yard engine without having the whistle blown or the bell rung, and without having the headlight of the engine lighted, and in being negligent through its foreman for not warning the de-

ceased of the approach of the yard engine in time for him to escape, although the foreman knew of the danger in ample time to have warned the deceased.

The defendant moved for a nonsuit raising the point under the issues of the pleadings that the foreman as well as the engineer of the locomotive which struck the deceased, and the deceased were fellow servants, and that the negligence of the defendant, if any there were, was not such as to render the defendant company liable in damages.

The court overruled the motion. The defendant then introduced evidence tending to show that the deceased was careless in not getting out of the way, as there was ample time for him to do. The court charged the jury, substantially, that if the deceased was injured by reason of the negligence or want of care of the foreman under whose orders he was acting, or the engineer, and not through his own carelessness, defendant was liable, thus assuming that the foreman and the engineer were not fellow servants of the deceased. The jury returned a verdict for the plaintiff in the sum of \$4,250, upon which judgment was entered. Defendant moved for a new trial, which was denied. This appeal is from the order denying the motion for a new trial and from the judgment.

Cases involving questions of who are fellow servants have not been very frequent in this court. While the statutes of the territory were controlling and the rule obtained that in every case where a servant acted under the order of his superior, the liability for injury sustained by the fault of the superior was the same as if such servant were a passenger; questions were necessarily determined by the local law and the liability of domestic railroad corporations was much more extensive than it is under the general law. This was decided when the question was presented in the first opinion in the case of *Criswell v. Montana Central Railway Co.*, 17 Mont. 189. But as we said in the case of *Goodwell v. Montana Central Railway Co.*, *ante*, page 293 :

“Since the decision of this court on the rehearing of the case of *Criswell v. Montana Central Railway Co.*, *ante*, page

167, announcing that the statute of the territory of Montana, which modified the common law rule of the liability of a master to his employes for injuries to the latter by the negligence of a superior, was repealed by the adoption of the state constitution, the courts are obliged to determine questions such as the one now before us by the general law."

Looking now at the general law of fellow service as expounded by the supreme court of the United States, we find that plaintiff in the case under consideration cannot recover.

In *Northern Pacific Railroad Co. v. Hambly*, 154 U. S. 349, it was decided that a day laborer, who while working for the railroad company, under the order and direction of a section foreman, on a culvert on the company's road, is injured by the negligence of a conductor and engineer in moving and operating a train upon the company's road, is a fellow servant with such engineer and such conductor in such a sense as exempts the company from liability for the injury so inflicted. The court there said :

"The question first arose in the case of *Randall v. Baltimore & Ohio Railroad Co.*, 109 U. S. 478, in which a brakeman, working a switch for his train on one track in a railroad yard, was held to be a fellow servant of an engineer of another train upon an adjacent track, upon the theory that the two were employed and paid by the same master, and that their duties were such as to bring them to work at the same place at the same time, and their separate services had as a common object the moving of trains. It is difficult to see why, if the case under consideration is to be determined as one of general and not of local law, it does not fall directly within the ruling of the *Randall case*. The services of a switchman in keeping a track clear for the passage of trains do not differ materially, so far as actions founded upon the negligence of train men are concerned, from those of a laborer engaged in keeping the track in repair; neither of them is under the personal control of the engineer or conductor of the moving train, but both are alike engaged in an employment necessarily bringing them in contact with passing engines, and in the 'im-

mediate common object' of securing the safe passage of trains over the road. As a laborer upon a railroad track, either in switching trains or repairing the track, is constantly exposed to the danger of passing trains, and bound to look out for them, any negligence in the management of such trains is a risk which may or should be contemplated by him in entering upon the service of the company. This is probably the most satisfactory test of liability. If the departments of the two servants are so far separated from each other that the possibility of coming in contact, and hence of incurring danger from the negligent performance of the duties of such other department, could not be said to be within the contemplation of the person injured, the doctrine of fellow-service should not apply.'

In accordance with the doctrine of the Hambly case, and the later decision of *Northern Pacific Railway Co. v. Peterson*, 162 U. S. 346, this court in *Goodwell v. Montana Central Railway Co.*, cited above, held that where an employe, a laborer repairing defendant's roadbed and under the orders of a section boss, was injured through the negligence of such boss, the laborer and the section boss were fellow servants and for an injury so received the company was not liable.

In principle there is; under the facts of the case at bar, no difference between the Hambly case and this one. The negligence, if any there was, which caused the death of the deceased was the negligence of his co-servants in performing duties devolving upon them. The general principles of the law of master and servant as set forth in the Goodwell case, *supra*, and the authorities cited in the opinion in that case are controlling in this instance.

We note, too, that the supreme court of the United States in *Northern Pacific Railroad Co. v. Charless*, 162 U. S. 359, has reiterated the doctrine of the Hambly opinion. In the Charless case the plaintiff was an ordinary laborer employed under a section boss or foreman to keep a certain portion of the roadbed in repair. The foreman employed the men. On the day of the accident the foreman and plaintiff were upon a handcar going to inspect some work. While turning a curve

in a narrow cut, an engine and freight train came in an opposite direction. No warning was given by the engineer of the freight train. Charless undertook to jump from the handcar but fell in front of it and was seriously injured by being run over by it. One of the grounds of negligence relied on was the negligence of the foreman; another was the negligence of the train hands on the approaching train in not giving signals of their approach around the curve and through the cut. The court held that the foreman was the fellow servant of the laborer and referred on that point to the Peterson case above cited, as governing the case. It was also held error to have submitted to the jury the question of the negligence of the employes on the extra freight train in failing to give the signals of its approach. "This failure," said the court, "assuming that it constituted negligence, was nothing more than the negligence of co-servants of the plaintiff below in performing the duty devolving upon them. The principle which covers the facts of this case was laid down in *Randall v. Baltimore & Ohio Railroad Co.*, 109 U. S. 478, and that case has never been overruled or questioned. The *Ross case*, 112 U. S. 377, is a different case, and was decided upon its own peculiar facts. See *Baltimore & Ohio Railroad Co. v. Baugh*, 149 U. S. 368, 380. Among the latest expressions of opinion of this court in regard to views similar to those stated in the case in 109 U. S., *supra*, is the case of the *Northern Pacific Railroad Co. v. Hambly*, 154 U. S. 349. It seems to us that the *Randall* and the *Hambly* cases are conclusive, and necessitate a reversal of the judgment. * * * We are unable to distinguish any difference in principle arising from the facts in these two cases."

It is clear to us that the case at bar was tried upon an erroneous theory of the law, arising doubtless by the belief on the part of the learned judge who presided, that the old territorial statute fixing a railroad company's liability was in force. But as it was not, the errors discussed were material and require a reversal of the case. Judgment and order reversed.

Reversed.

PEMBERTON, C. J., concurs. DE WITT, J., not sitting.

TUDOR ET AL., APPELLANTS, v. DE LONG ET AL., RE-
SPONDENTS.

[Submitted September 18, 1896. Decided October 5, 1896.]

FRAUDULENT CONVEYANCE—Surety—Creditors.—A conveyance by the defendant of his property to his surety on certain notes to secure him against liability thereon, and in consideration of the surety also assuming the payment of further indebtedness of the defendant, is not fraudulent as against creditors of the defendant whose claims were not embraced among those to be paid by the surety.

Appeal from Ninth Judicial District, Gallatin County.

ACTION to annul certain conveyances as fraudulent. Judgment was rendered for the defendants below by ARMSTRONG, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action to set aside a conveyance made by defendant Burk to defendant DeLong to certain real estate in Gallatin county, and also a chattel mortgage to certain personal property made by said Burk to said DeLong for alleged fraud in the execution of said instruments. Both of said instruments were executed on the 13th day of February, 1894, and both are attacked on the same ground of alleged fraud in the execution thereof.

The complaint alleges generally that both of said instruments were executed for the purpose of cheating, defrauding, hindering and delaying the creditors of Burk, and that they were both executed and delivered without any consideration whatever having passed from DeLong to Burk. Plaintiffs were creditors of Burk before and at the time of the execution of said instruments.

The answer denies the material allegations of the complaint. The case was tried by the court without a jury. The judgment of the court was for the defendants. Plaintiffs appeal from the judgment and order of the court refusing a new trial.

J. L. Staats, for Appellants.

Luce & Luce, for Respondents.

PEMBERTON, C. J.—An inspection of the record in this case discloses the fact that on the 13th day of February, 1894, the date of the two conveyances attacked and sought to be set aside for alleged fraud, and prior thereto, the defendant Burk was indebted to divers creditors, and that he was being pressed for payment of his debts, especially by the Gallatin Valley National Bank to which he owed a considerable sum. It appears that at this time DeLong was surety for Burk on notes for about \$2,700. To secure DeLong against this liability, and to secure DeLong against damage and loss by reason of his (DeLong's) assuming about \$2,000 additional indebtedness of Burk to said bank and other creditors who were crowding him for payment, Burk executed and delivered to DeLong the deed and chattel mortgage sought to be set aside in this proceeding. The plaintiffs, who were creditors of Burk, were not secured or preferred by the conveyances above mentioned. There was no other consideration for the execution of the deed and chattel mortgage involved than that stated above. No money passed from DeLong to Burk as a consideration for the making of such instruments.

The appellants contend that the deed and chattel mortgage made by Burk to DeLong under the circumstances stated above to secure DeLong as Burk's surety, and also to protect DeLong against damage on account of his assuming the payment of Burk's debts were made without consideration and were and are, therefore, void as to plaintiffs. The court evidently found that there was sufficient consideration shown for the execution and delivery of the instruments attacked, and that there was no fraud in the arrangement between Burk and DeLong by and on account of which Burk transferred his property to DeLong; and upon such view of the case the court evidently made its finding and rendered its judgment.

This action of the court constitutes the principal, if not the sole, ground of complaint of the appellants. It is the only

error really relied upon, though others are assigned. It is the alleged error against which counsel directs his main argument.

The court simply found that DeLong was surety for Burk on notes to about \$2,700, and had assumed in addition thereto the payment of about \$2,000 of Burk's debts, and that to secure himself against such liabilities he had taken the deed and chattel mortgage attacked in this proceeding. It is not claimed that the transaction between Burk and DeLong was not *bona fide* for the purpose and for the consideration stated above. We are at a loss to see how the court could have found otherwise than it did. DeLong had a legal right to demand and take security against the liabilities he assumed for Burk. Burk had a legal right to secure him in the manner he did. That the giving of the deed and chattel mortgage to DeLong amounted to a preference by Burk of other creditors gave the plaintiffs no right of action. Such a preference is not of itself fraudulent nor is it prohibited by law. (*Priest v. Brown*, 35 Pac. 323 (Cal.) and cases cited; *Ross v. Sedgwick*, 10 Pac. 400; *Smith v. Rankin*, 25 Pac. 586; *Warren v. His Creditors*, 28 Pac. 257.)

If it were necessary to cite authorities in support of the finding and judgment of the lower court in this case, we think the above amply sufficient. There is no pretense, supported by the evidence, that there was any actual or intentional fraud in the execution of the deed and chattel mortgage sought to be set aside in this case.

The appeal appears to us to be without merit, if not absolutely frivolous. The judgment and order of the district court appealed from are affirmed.

Affirmed.

DE WITT and HUNT, JJ., concur.

STATE EX REL. WOODY, v. ROTWITT, SECRETARY OF STATE, RESPONDENT.

[Submitted October 8, 1896. Decided October 12, 1896.]

ELECTIONS—Judicial nomination—District comprising two counties.—Where a judicial district comprises two counties the nomination of a candidate for district judge by a political party at a county convention composed of delegates of that county alone, without the other county having an opportunity to participate in the proceedings, is a nullity.

SAME—Conventions.—The conventions and primary meetings provided for by sections 1310, 1311, 1312 of the Political Code, held for the purpose of nominating candidates for public office, are meant to be organized assemblages of electors or delegates fairly representing the entire body of electors of the political party which may lawfully vote for the candidates of any such convention.

SAME—Nominations by petition.—Section 1313 of the Political Code, permitting a candidate for public office to be nominated by certificate or petition signed by a certain percentage of the electors residing within the political division for which the officer is to be elected, contemplates simply the candidacy of one not a nominee of a party, as an independent or electors' candidate, and where no effective nomination for a particular office has been made by any convention or primary meeting held by the delegates of an organized political party for the purpose of nominating a candidate for that office, a person is not entitled to have his name placed upon the regular party ticket as a nominee for the office solely by petition of voters who nominate him as the candidate of such regularly organized party. In such case he is simply the candidate of those individual electors who have joined in nominating him and is only entitled to be placed upon the ballot as such a candidate.

ORIGINAL PROCEEDING. Application for an injunction.
Writ made permanent.

Statement of the case by the justice delivering the opinion.

The petitioner applies for a writ of injunction commanding the defendant secretary of state to refrain from certifying to the county clerks of Missoula and Ravalli counties the name of George W. Reeves, Esq., as the candidate of the "Silver Republican Party" or of the "Republican Party of the state of Montana," for the office of judge of the fourth judicial district, state of Montana.

It appears by the petition that on September 3d, 1896, the petitioner was duly nominated by a convention of delegates who were resident in Missoula and Ravalli counties, as the Democratic candidate for judge of the fourth judicial district, comprising the counties of Missoula and Ravalli; that a con-

vention of the Republican party, consisting of delegates from the counties of Missoula and Ravalli, on the 9th day of September, 1896, duly nominated one E. E. Hershey as the republican candidate for judge of the district court. It was conceded, however, during the argument that no certificate of Hershey's nomination was ever filed with the secretary of state, as is required by law, and that even if it were so filed he is not a candidate, having notified the secretary of state of his declination of any nomination as district judge. The petitioner next avers that the Silver Republican party has been a regular political organization since September 9, 1896, and has nominated officers and published the principles it proclaims and advocates; that on September 22d, 1896, the Republican party held a county convention in Missoula county to nominate county officers, the delegates to said convention being from Missoula county exclusively, but that the said county convention pretended to nominate George W. Reeves as the Republican candidate for judge of the fourth judicial district, and on October 3, 1896, filed with the defendant a certificate stating in substance that at a convention of the republican party, held on the said last mentioned date, of Missoula county, the said George W. Reeves was by the said convention nominated for judge of said fourth judicial district. It then appears that immediately upon the conclusion of the proceedings of the Republican county convention, a portion of the delegates to the same assembled as a Silver Republican convention, and among other proceedings of said convention so assembled the delegates nominated the said Reeves for the office of district judge, and on October 3, 1896, filed a certificate with the defendant, reciting in substance that the said Reeves had been nominated by such convention as the candidate of the Silver Republican party.

It is averred that the nominations just referred to are void because they were not made by any convention in which the county of Ravalli was represented, or was invited to be represented or had an opportunity to be represented.

The petitioner then sets forth that on October 3, 1896, there

were filed with the secretary of state four lists of names whereby certain qualified electors of Missoula county nominated George W. Reeves as candidate of the Silver Republican party for district judge of the fourth judicial district. The petitioner alleges that those petitions are defective by reason of electors in certain instances omitting to sign their places of residence and occupations as required by law. It is next averred that on October 3, 1896, certain other petitions were filed with the secretary of state, wherein certain electors attempt to nominate the said George W. Reeves as the candidate of the "Republican Party of the state of Montana." But the petitioner alleges that these petitions are defective by the omissions in certain cases to add to the names of the electors their places of residence, etc. It is also averred that there are not enough names upon the petitions referred to to nominate the said George W. Reeves according to law.

The secretary of state by answer denies that Hershey was ever duly nominated and alleges that at a regular Republican state convention composed of electors from all the counties in the state, the delegates attending such convention from Ravalli and Missoula counties without right or authority assembled and pretended to nominate Hershey, but never filed any certificate of nomination, and that said Hershey was regularly nominated by the Republican county convention of Missoula county as county attorney for said county. The defendant denies "on information and belief that the Silver Republican party has been at all times since the 9th day of September, 1896, a regularly organized and existing political party in the said fourth judicial district of the state of Montana;" alleges that the Missoula Republican county convention nominated said Reeves as a candidate for judge, and filed with the defendant on October 3, 1896, a certificate in due form; admits that after the Republican county convention had adjourned *sine die*, a part of the delegates attending such convention assembled as a Silver Republican convention, and alleges that after assembling and duly organizing as a convention representing the Silver Republican party, they nominated said Reeves as a can-

didate for judge and in due form filed a certificate of nomination with the defendant. The defendant alleges on information and belief that neither the Republican party, nor the Silver Republican party in Ravalli county have ever held a convention for the purpose of nominating a candidate for the office of judge of the fourth judicial district, but have acquiesced in the nomination of the said Reeves for said office.

The answer admits the filing of the petitions referred to by the allegations of plaintiff's petition, but denies the defects alleged in the petitions. It is unnecessary to mention the particular defects in the denials more specifically, as they are not material to the decision of the case. To this answer the petitioner filed a demurrer.

T. J. Walsh, for Relator.

Henri J. Haskell, Attorney General, *M. S. Gunn* and *Thomas Marshall*, for Respondent.

HUNT, J.—The attempted nomination of Mr. Hershey as Republican candidate for district judge by the delegates to the state convention on September 9, 1896, from Ravalli and Missoula counties is not important, because, whether the method pursued was legal or not is immaterial, inasmuch as Mr. Hershey expressly declined to be a candidate, by a written declination on file with the secretary of state. So that if the judicial district was properly represented by the assembling of the delegates to the Republican state convention from the several counties of the district in a district convention, and if such district convention properly exercised its powers by selecting a candidate, still their work as a district convention has become ineffective both by the declination of Mr. Hershey and by the failure of any subsequent concerted action by such district convention, or by any committee delegated by such convention to substitute another candidate in place of Hershey. The fact is, therefore, that there is no Republican candidate for district judge who was nominated by any convention of delegates chosen from Ravalli and Missoula counties. So far the case is perfectly simple.

But in the current of political conventions, on September 22, 1896, the Republican party, in and for Missoula county, held a county convention to nominate candidates for county offices in Missoula county. This convention, it appears by the pleadings, was essentially a county convention for the county of Missoula. It is admitted that its delegates were exclusively from Missoula county, and its functions were evidently intended to be limited to the single purpose of making nominations usually and appropriately to be made by a county convention. No invitation was ever extended to the Republicans of Ravalli county to send delegates to the convention—no opportunity was given to Ravalli county to participate in the convention, and there was in fact no representation at all of Ravalli county. This county convention, however, went beyond its evident primary purposes and nominated a candidate for a state office—judge of the district court for the fourth judicial district—an official in whose election Ravalli as well as Missoula county is deeply interested, and for whose election each is authorized to vote under the constitution and laws of the state. We are irresistibly led to the conclusion that the elector who may vote for the election of a judge of a judicial district should have every fair and usual opportunity to participate jointly in the convention nomination of a candidate for that office and should jointly participate, or decline to do so. The letter of our constitution is, “the state shall be divided into judicial districts in each of which there shall be elected by the electors thereof one judge of the district court,” etc. Thus is the right preserved to the electors to choose their own judicial officers; and it is strictly in accord with the spirit of popular elections in our land that where the official is to be elected by the joint vote of several counties, the nomination of a candidate to represent any political organization should be by representatives of such party from all such several counties acting jointly.

The statutes, sections 1310, 1311, 1312, Political Code, recognize systems of conventions and primary meetings held to nominate candidates for public office. Such conventions

are, however, in our judgment meant to be organized assemblages of electors or delegates fairly representing the entire body of electors of the political party which may lawfully vote for the candidates of any such convention. In a similar case, *State v. Weir*, (Wash.) 31 Pac. 417, the supreme court of Washington said: "The plain intent of said section, when examined in the light of all the other sections upon the subject, makes it perfectly clear that the primary meeting or convention must be by or on behalf of the entire body of voters of the respective party who are to be allowed to vote at the election of the officers therein nominated."

We, therefore, think the Missoula county Republican convention did not represent the Republican party of the fourth judicial district and its action in nominating a candidate for judge was, under the pleadings of this case, a nullity.

These observations are equally pertinent to the certificates purporting to be the nomination papers of George W. Reeves by the convention of the silver republican party of Missoula county. "The Silver Republican party"—it being conceded by the pleadings on both sides that such an organization existed in Missoula county September 22, 1896—in its convention ignored the rights of Ravalli county, as did the Republican convention. Their action, therefore, is to be judged in the same manner, and our conclusion must be that no benefit can accrue to Mr. Reeves as a convention nominee of that organization for the office of district judge.

No Republican or Silver Republican convention having lawfully nominated a candidate for district judge, we will now briefly consider the certificates of nomination filed by the electors of Missoula and Ravalli counties and determine what, if any, standing they give to Mr. Reeves. These petitions may be regarded, for the purposes of this decision, as subscribed by the required number of electors, and as otherwise regular under Sec. 1313, of the Political Code except as hereinafter discussed. This section provides in part that: "Candidates for public office may be nominated otherwise than by convention or primary meeting in the manner following: A certificate of

nomination, containing the name of a candidate for the office to be filled, with such information as is required to be given in certificates provided for in section 1311 of this chapter, must be signed by electors residing within the state and district or political division in and for which the officer or officers are to be elected, in the following required numbers." Now, still assuming that these certificates were regular in form, as above noted we find that they are attempts to nominate Geo. W. Reeves, Esq., as the candidate of regularly organized parties, namely, the "Silver Republican Party" and the "Republican Party" of Missoula and Ravalli counties. The question, therefore, resolves itself into this: No effective nomination for district judge having been made by any convention or primary meeting held for the purpose of making a district nomination, (although a convention, purporting to be a district convention, was held and took initiatory steps towards nominating another candidate,) under such circumstances can a person get his name on the ticket of a regular party as a regular party nominee solely by petition of voters who nominate him as the candidate of such regularly organized party? We do not think he can. The petitions in this case constitute an attempt on the part of the electors who signed them to make George W. Reeves, Esq., the candidate of an organized party by petition. What the reasons were which moved the electors to secure these petitions is not material. Perhaps the invalidity of the nomination of a candidate for judge by the Missoula county conventions became apparent, and to overcome this difficulty it was thought proper to make party nominations by petition of electors residing within the entire election district. But, whatever the object of the double systems employed may have been, it is plain that Judge Reeves was simply intended to be nominated as the candidate of the Republican and Silver Republican parties. His counsel throughout argument have contended and expressly reiterated time and again that he is not an electors' candidate but is the regular candidate of those two political organizations, thus candidly conceding that unless the nomination is good as the

candidate of the parties above named, it is altogether void. We think this position of counsel under the facts of this case is but honest and correct, and we agree that unless Judge Reeves is a regularly nominated party candidate his name should not go on the ballot at all. The certificates and petitions by their phraseology asked that George W. Reeves, Esq., be made a party candidate, and the electors who signed those petitions must have acted under the belief that he might become a candidate of the political parties named in the petitions. We may, therefore, invoke the doctrine of the *Stackpole case*, 16 Mont. 40, in this inquiry by limiting ourselves to the consideration of the case brought before the court in the manner and under the circumstances and in connection with the facts as they appear by the record and by the oft repeated legal attitude conforming to those facts that the counsel frankly assumed before the court. We are, therefore, spared entering into any discussion of the question whether Judge Reeves' certificates and petitions, purporting to nominate him as the Republican Party candidate and the candidate of the Silver Republican Party, are good as independent nominations of an independent or electors' candidate. We will not now decide that under Sec. 1313, Political Code, a certificate of nomination by electors to be valid *must* contain the designation of a party or principle. We are disposed to regard that section of the Code as contemplating simply the candidacy of one not a nominee of a party—an independent or electors' candidate. When the statutes are read with relation to the different conditions contemplated we are not prepared to say that the *information* referred to in Sec. 1313 necessarily extends to more than the name, residence, business address and the office for which the candidate is nominated; the question is one proper to be reserved until directly before us. But returning to the direct point to be passed upon, we are obliged to hold that Judge Reeves, by the petitions, cannot have his name placed on the ticket of a regular party in existence.

The law contemplates nominations by conventions, by primary meetings held to make nominations or by petition by a cer-

tain number of electors resident within the district or political division in which the officer is to be elected. Conventions or primary meeting nominations under the law are made by organized assemblages of electors or delegates representing a political party or principle, and only candidates so nominated or nominated by committee with delegated authority to nominate, are the nominees of political parties, and only such are entitled to be placed as regular party nominees upon the official ballots. A candidate certified as nominated by electors is not nominated by a political party. He is simply a candidate of those individual electors who have joined in nominating him, and he is only entitled to be placed upon the ballot as such a candidate. There is no positive obligation upon a political convention to make a nomination for a political office. Considerations of expediency may, and sometimes do, make it wise in the judgment of a convention not to place any nominee of the party upon their ticket, and this right of a political convention should be guarded. If it were otherwise, peculiar conditions of political affairs might arise ; for instance : a state convention of a party might see fit to make no nomination for a member of congress. Their action in thus refusing to nominate would be that of an organized assemblage of delegates representing a political party and its principles. But if any number of electors may by petition certify to the secretary of state a candidate for congress and make him the candidate of that political organization which in convention had declined to nominate a candidate, the law would countenance the frittering away of all rights commonly accorded to political conventions as representing political parties, and any name might be placed upon a ticket. Again, the secretary of state, by section 1317, is obliged to certify to the county clerk the name and description of each person nominated as specified in the certificates of nomination filed in his office. It is by means of this certification of the secretary of state that the county clerk is informed how to prepare the official ballot for electors. The certificate to the secretary of state emanating from a convention or primary meeting must be signed by the officials

of the convention; the certificate of nomination by electors must be signed by the electors only. The certificate emanating from the officers of a convention clearly must designate the principle or party represented by the convention. By means of this designation in the convention certificate the secretary of state specifies the description of the person nominated, including his party designation; but the law, except perhaps in cases presenting unusual conditions, does not authorize *electors* who may make a nomination by petition, to make their nominees the nominees of an organized political party whose name they may select, provided such party is authorized to make a nomination by convention or primary meeting held for the purpose of making nominations. The secretary of state, therefore, cannot certify a candidate so nominated by *electors*, as the candidate of a political party, for clearly he is not such a candidate and has no place in a group of candidates certified as nominated by a regular political party convention or organization, under the name of the party making such nomination. We find authority for these views in the cases of *Atkeson v. Lay*, (Mo.) 22 S. W. 481; *Phillips v. Curtis*, (Idaho) 38 Pac. 415.

We conclude under the facts of this case that the Republican conventions of the district have not nominated Judge Reeves as their candidate, and it being our opinion that the attempts to make him the candidate of such parties by petition are invalid, and as the court is not requested to regard him as an independent or electors' candidate, it necessarily follows that the demurrer must be sustained and the writ of injunction prayed for will be made permanent and it is so ordered.

Writ granted.

PEMBERTON, C. J., and DE WITT, J., concur.

MADDOX, (GADDIS, INTERVENOR), RESPONDENTS, v.
TEAGUE ET AL., APPELLANTS.

[Submitted June 17, 1896. Decided October 12, 1896.]

LAW OF THE CASE—Decision of the United States Supreme Court—When not controlling.—Where upon the first trial of a case in the district court the defendants assumed the burden of proof and introduced testimony and the case was removed from the jury and judgment rendered for plaintiff, which was affirmed by the supreme court of the territory, a decision of the supreme court of the United States reversing the judgment for error in removing the case from the jury, ceases to be the law of the case so as to control the courts of this state, where upon the second trial the testimony of both plaintiff and defendants is submitted to the jury and a new state of material facts disclosed. (*Creighton v. Hershfield*, 2 Mont. 169; *Daniels v. Andes Insurance Co.* 3 Mont. 500; *Palmer v. Murray*, 8 Mont. 174; *Kelly v. Cable Company*, 8 Mont. 440; *Davenport v. Kleinschmidt*, 8 Mont. 467, cited.)

SAME—Same—Chattel mortgage sale.—The ruling of the territorial supreme court upon the former appeal of this case, that by the delivery of the chattel mortgage to the sheriff for the purpose of selling the property, he had authority to sell only for cash, not being disturbed by the decision of the United States supreme court, remains the law of the case upon this appeal.

CHATTEL MORTGAGE—Auction sale—Sheriff—Liability for credit sale.—Where a sheriff in foreclosing a chattel mortgage upon a band of horses accepts a deposit from a bidder and then receives his bids upon a large portion of the horses, until his purchases greatly exceed the amount of the deposit, without further payment being made, and thereupon permits the mortgagor to redeem the unsold horses upon the payment of a sum of money which, together with the amounts already bid, was sufficient to satisfy the entire mortgage debt, and pays to the mortgagee the amount actually collected less the costs of the sale, he will be regarded as having treated the transaction as a completed sale so as to render him liable to the mortgagee for the amount for which such unpaid bids exceed the deposit.

SAME—Same—Ratification of unauthorized sale.—Where it was contended by the sheriff that the mortgagee's agent authorized him to receive such bids in excess of the deposit under an arrangement whereby the deposit and horses were to be forfeited to the mortgagee in the event of the bidder failing to make good his bids within a specified time, which arrangement was denied by the mortgagee's agent, it was proper to submit to the jury the intention and understanding with which the mortgagee accepted from the sheriff a payment embracing such deposit, on an issue as to whether by so accepting it he ratified such alleged arrangement.

APPEAL—Departure in pleading—Motion to strike out—Review on appeal.—A motion to strike out a portion of a replication as being a departure from the complaint will be held to have been properly overruled where the motion failed to point out in what the alleged departure consisted.

SAME—Sufficiency of objections to testimony.—Objections to testimony on the trial which fail to point out the grounds upon which the objections are made will not be considered on appeal. (*State v. Black*, 15 Mont. 148, cited.)

Appeal from Sixth Judicial District, Meagher County.

ACTION on sheriff's bond. The cause was tried before HENRY, J. Plaintiff had judgment below. Affirmed.

Statement of the case by the justice delivering the opinion.

The plaintiff Maddox, and intervenor Gaddis, obtained a judgment in this case in the year 1888. That judgment was affirmed by the territorial supreme court (9 Mont. 126.) On writ of error from the supreme court of the United States the judgment of the territorial supreme court was reversed. On mandate from the United States supreme court to us a new trial was ordered in the district court of the state. For the history of the case up to the time of the second trial see 9 Mont. 126 and 150 U. S. 128. On the second trial in the district court verdict and judgment were also for plaintiff and intervenor. Defendant's motion for a new trial was denied. The appeal now is from the judgment and that order.

On the second trial the defendants, as in the first, had the burden of proof. On this trial the testimony of the defendants was not stricken out as it was in the first, but it went to the jury along with the testimony of the plaintiff and the intervenor ; and, under instructions of the court, the facts thus testified to were passed upon by the jury. When the second trial took place, defendant Rader was dead and Teague, his administrator, was substituted, and now appears as defendant and appellant. The other defendants are sureties on Rader's official bond as sheriff. There is a complaint by the plaintiff and also by the intervenor ; and, as remarked in appellants' brief, they are substantially alike. Appellants also say that the intervenor's case must stand or fall with the judgment entered in favor of plaintiff. We will therefore consider the complaint of plaintiff alone.

That pleading alleges the fact of Rader being sheriff of Meagher county, and his giving his official bond, with the defendants other than him as sureties; that on August 9th, 1887, plaintiff gave Rader a chattel mortgage, executed by P. D. Kinyon to secure the plaintiff in the sum of \$7,313, and interest, and Gaddis in the sum of \$3,000, with interest; that plaintiff directed said Rader to seize the property described in the mortgage and sell the same, etc.; that Rader, between August 9th and 30th, 1887, seized and advertised the property, to-wit, horses, and between August 30th and September

5th, sold a large quantity of the horses for \$10,735, and on September 5th released the balance of the property unsold to said Kinyon upon the payment by Kinyon to him of a sum of money, which with the \$10,735 aforesaid was sufficient to satisfy the mortgage with interest and costs ; that on September 5th, 1887, there was due to plaintiff \$7,048, with interest, making \$8,187 ; that on September 15th, Rader paid to plaintiff \$2,872.31, leaving a balance of \$5,314.69 ; that plaintiff demanded payment of this sum and defendant Rader, contrary to the obligations of his bond, refused said payment. Judgment was demanded for said sum.

For answer the defendants denied that Rader had received the sum of \$10,735, or any greater sum than \$3,390.65. Further answering they allege that 142 horses, mares and colts were bid off and knocked down to one A. B. Kier for \$8,096.50, and that in pursuance to instructions from the mortgagees and according to an agreement then made between the mortgagees and Kier, whereby Kier was to pay Rader and did pay him \$1,752.15, and was to have five days in which to pay the balance, Rader to retain the horses, mares and colts until full payment was made, and in event of Kier's failure to pay, the said sum of \$1,752.15 was to become forfeited to the use of the mortgagees and the horses to be retained by Rader on account of the mortgagees, the said Rader did retain said \$1,752.15 and did pay the same to the mortgagees, said sum being part of that which he paid over to the mortgagees ; and that Rader retained in custody the 142 horses subject to the order of the mortgagees ; that afterwards Rader notified the mortgagees of Kier's failure to pay the balance and that the horses were held subject to their order, and that the mortgagees failing to direct the disposition of the horses, Rader tendered them to the mortgagees and that they refused to receive them ; and that Rader holds the same subject to the orders of the mortgagees ; that on September 5th, Kinyon, the mortgagor, tendered and paid to Rader \$2,459.20, the balance due on the mortgage and demanded the return of the property unsold ; that Rader returned to Kinyon said unsold property

and paid to the mortgagees the said sum of \$2,459.20. These are the material allegations of the answer.

Plaintiff in replication admitted that at the sale 142 head of horses were bid off and knocked down to said Kier for \$8,096.50 but denied that this was done pursuant to instructions from the mortgagees or according to any agreement as set forth in the answer, or that any such agreement was made between them and Kier; or that they ever agreed that Kier was to have any time in which to pay for the horses, or that in event of his failure to pay they were to be retained by Rader on account of the mortgagees; denied that Rader retained the horses subject to the order of the mortgagees, but held them under his own control for the purpose of enabling Kier to pay the balance of \$8,096.50, and that this Rader did pursuant to an agreement between him and Kier at his own risk for a period of thirty days; denied that Rader notified the mortgagees that the horses were held subject to their orders or that he tendered the horses, but on the contrary alleged that Rader retained the horses to enable Kier to pay the balance and assisted Kier in efforts to raise the money for that purpose; that thereafter the sheriff sold many of the horses to other persons, and that thereafter he delivered a portion of the horses to his co-defendants, who sold some of them and divided between themselves some \$1,500. The replication admits that Rader paid to plaintiff the sum of \$3,192.93, and to Gaddis \$1,591.57, but avers that when that money was received plaintiff was not informed by Rader that the deposit of \$1,752.15 made by Kier was embraced in said sum of \$3,192.93, and that when plaintiff received said sum he had no knowledge that the payment embraced the \$1,752.15 alleged to have been forfeited, as set up in the answer; and that the payment of \$3,192.93 by Rader to him was not intended or understood as a transfer of the money alleged to have been deposited as a forfeiture, but was a payment on account upon the sum that Rader was then owing plaintiff.

Upon these pleadings the case was tried and evidence introduced on both sides. Verdict and judgment were for the plaintiff and the intervenor.

H. G. McIntire, Max Waterman and Cullen & Toole, for Appellants.

I. Plaintiffs amended replication was a departure in pleading. The allegations contained in it are an attempt to set up a conversion of these horses by the defendants at a date subsequent to the time, it is alleged in the complaint, they were sold at public auction. The cause of action alleged in the complaint is one of completed sale made by the sheriff, and his failure to account for a portion of the proceeds which he realized from such sale. The cause of action thus alleged is inconsistent with and repugnant to the idea of a conversion of this same property at a time subsequent to the sale, as alleged in the replication. If the allegations in the complaint, that there was a sale of this property, are true, then the allegation in the replication with reference to a conversion of it, after such sale by these defendants, must of necessity be untrue. (Moaks' Van Santvoords' Pleadings, page 719; Maxwell on Code Pl. 559; Bliss Code Pl. §396; *Hauswirth v. Butcher*, 4 Mont. 308.)

II. Not only is it alleged in the answer and admitted by the replication that the 142 head of horses bid in by and knocked down to Kier were not sold, but that fact appears from the testimony of every witness who was present at the sale. Furthermore, they are exactly the facts recited in *Rader's Administrator v. Maddox*, in the supreme court of the United States, (150 U. S. 130,) and which that august tribunal declared did not constitute a sale. Not an authority can be found which holds that such facts would constitute a sale, but if every authority in the books was in direct conflict with the decision of the supreme court of the United States on this question, that decision would still be controlling in every subsequent stage of the case. The very court that made the decision would be bound by it, even though upon a fuller argument or more deliberate consideration of the facts on a second appeal it might be of the opinion that it was erroneous. If upon a second appeal the same state of facts substantially

is presented as upon the former appeal, the former decision settles the law of the case and is conclusive. (*Pollock v. McGrath*, 38 Cal. 667; *Lick v. Diaz*, 44 Cal. 479; *Gates v. Salmon*, 46 Id. 861; *Creighton v. Hershfield*, 2 Mont. 169; *Daniels v. Insurance Company*, 2 Mont. 500; *Barkley v. Tieleke*, 2 Mont. 433; *Palmer v. Murray*, 8 Mont. 174; *Kelley v. Cable Co.*, 8 Mont. 440; *Davenport v. Kleinschmidt*, 8 Mont. 467.)

III. With reference to the instructions given in this case, we may say generally, that an instruction, which considering the testimony and the nature of the case is liable to mislead the jury, should not be given even though the principle of law therein stated may be correct, as an abstract principle. (*Huntoon v. Lloyd*, 7 Mont. 365; *Boucher v. Mulverhill*, 1 Mont. 306.) The instruction must be applicable to the case made and warranted by the testimony. (*Dupont v. McAdow*, 6 Mont. 234; *Brownell v. McCormick*, 7 Mont. 12; *Kelley v. Cable Co.*, Mont. 70.)

Toole & Wallace, for Respondent, Maddox.

1. On the former trial only the defendant's evidence was before the court while on this trial the whole case was submitted to the jury and no characterization of the result of a part only of the defendant's present case or evidence could be said to be the law of the case as applied to our proofs, which were never before the United States supreme court and which the jury by their verdict found to be the truth as to the transaction. By reason of these differences so far as the defendant's case alone is concerned, the decision of the United States supreme court is no longer the law of the case. The rule stated by appellants has no application when the evidence on the second trial is different from that which was before the appellate court. (*Hayne New Trial*, p. 877, § 291 and cases cited.) If the cause be remanded for a new trial, the parties have the right to introduce new evidence and establish a new state of facts, when this is done the decision of the court of last resort ceases to be the law of the case. (1 Herman on

Est. p. 118.) Appellants claim the benefit of so much of the opinion of the United States supreme court as seems to hold that the facts did not constitute a sale but ignore that portion of the decision which especially says: "It may be that this case may turn somewhat on whether the sheriff and plaintiff understood and intended that the payment of the money was in fact a transfer by him to them of the deposit or merely a payment on account." A party cannot claim the benefit of a portion of a decision as the law of the case. He must accept all of the qualifications stated in the opinion. (Hayne New Trial, p. 878; *Mulford v. Estudillo*, 32 Cal. 137.) When new evidence is introduced on the second trial and a new state of facts established or the issues changed by reason of amendments, the decision of the appellate court ceases to be the law of the case. (*Dodge v. Gaylord*, 53 Ind. 365, 369; *Pressly v. Lamb*, 105 Ind. 171, 179; *Ellston v. Kennicott*, 52 Ill. 272; *Lane v. Starkey*, 20 Neb. 586; *Bloomfield v. Buchanan*, 14 Ore. 181; *Klauber v. San Diego S. C. Co.*, 98 Cal. 104.)

II. To have ratified any alleged arrangement made by Smith, Maddox must have received the money paid by Rader to him, as money representing the Kier deposit and must have so received it, with a full knowledge of the facts as alleged in the answer, or with a determination without inquiry to assume the responsibility of the alleged arrangement. (*Fox v. Jackson*, 8 Barb. 355; *Adam v. Freeman*, 9 Johns 118; *Lewis v. Reed*, 13 M. & W. 834; *Hyde v. Cooper*, 26 U. T. 552.)

III. The objections to the admission of alleged incompetent testimony, with a few exceptions, fail to state the ground of objection and are therefore insufficient to entitle them to review on appeal. (*State v. Black*, 15 Mont. 148; *City of Helena v. Albertose*, 8 Mont. 499; *Territory v. Bryson*, 9 Mont. 32; *Tucker v. Jones*, 8 Mont. 225.)

H. E. Thompson and Carpenter & Carpenter, for Respondent Gaddis.

DE WITT, J.—The gist of appellants' contention is that the

decision of the United States supreme court was the law of the case for the district court and now for this court, and that the law of the case, as they understand it, was disregarded by the district court in various rulings, to which they duly excepted and which they have reserved for review on this appeal.

We will start more clearly if we first define what is our understanding of the decision by the supreme court of the United States as the law of the case. On the first trial all the testimony offered by the defendants was excluded from consideration, and judgment was rendered by the court in favor of plaintiff and intervenor. (9 Mont. at page 134.) In this condition the case came before the United States supreme court. That court said that therefore it would be assumed by them that the facts were as this excluded testimony tended to prove they were. (150 U. S. at page 130.) There was, therefore, no rebutting testimony by plaintiff or intervenor to be considered by the supreme court. But upon this second trial there was rebutting testimony. The proffered testimony of the defendants was not taken to be the facts. All the testimony went to the jury. They passed upon all the facts. Furthermore, this testimony thus before the district court, and before us now, discloses facts, or evidence tending to prove facts, that were not before the court on the other appeal. As to a new state of facts, or a state of material facts newly in evidence, the former decision of the court is not the law of the case. (*Creighton v. Hershfield*, 2 Mont. 169; *Daniels v. Insurance Co.*, 2 Mont. 500; *Palmer v. Murray*, 8 Mont. 174; *Kelley v. Cable Co.*, 8 Mont. 440; *Davenport v. Kleinschmidt*, 8 Mont. 467; Hayne on New Trial and Appeal, § 291.)

The United States supreme court did not hold in its opinion that there was no completed sale made by Rader to Kier. It is said in the opinion that no completed sale was made, but this is *obiter*, for the court after making this remark leaves the subject with this language: "But it is unnecessary to pursue any inquiry in this direction, for upon a very clear

rule of law the mortgagees are estopped from maintaining this action." (150 U. S. at p. 130.) The decision of the supreme court was in fact based upon the opinion of that tribunal that the receipt by Maddox of \$1,752.15 was a ratification by him of the alleged acts of his agent Smith, and that Maddox was estopped to deny the authority of Smith. But even this view was hedged by the supreme court when they say in the opinion: "It may be that this case turns somewhat on whether the sheriff and plaintiffs understood and intended that the payment of this money was in fact a transfer by him to them of the deposit, or merely a payment on account; but even if this be so, the question was one of fact to be settled by the jury, and should not have been disposed of by striking out all the testimony, and withdrawing the case from the jury." (150 U. S. 131.)

This, as the supreme court says, was a question of fact for the jury to determine. It was taken from the jury by the action of the court on the first trial. It was not taken from the jury on the second trial, but was submitted with appropriate instructions.

Therefore, by the opinion of the supreme court of the United States, three questions seem to us to have been left open for the second trial, viz:

First, whether Rader treated the transaction as a completed sale;

Second, whether Maddox received the deposit of said \$1,752.15, he and the sheriff understanding that it was intended that the payment of this money was in fact a transfer to him of the deposit or merely a payment on account; and

Third, whether Maddox received this \$1,752.15 along with the other money paid to him by Rader with knowledge of an agreement between his agent, Smith, and Rader and Kier, such as is set out in defendants' answer, that is to say the alleged agreement that Kier's deposit on the horses, bid in by him, and the horses, should be forfeited to the mortgagees in case full payment were not made.

These questions were submitted to the jury by appropriate instructions.

In treating these questions left open by the decision of the United States supreme court, it is necessary to first inquire whether the defendants made out their defense set up in their answer, and to understand clearly just what that alleged defense was. As it appears by the answer it was this, namely: that the agreement made at the time of the sale between Rader, sheriff, Kier, bidder, and Smith, mortgagee's agent, was that, in the event of Kier's failure to pay the balance on his bid, the \$1,752.15 already paid in by him to the sheriff, should be forfeited to the mortgagees and that the horses should be retained by Rader on account of the mortgagees. They then further contend that as Rader paid the \$1,752.15 to Maddox and tendered to Maddox the horses, and that as Maddox accepted the money, although he refused the horses, this was a ratification by Maddox of the agreement pleaded in the answer and claimed to have been proven, and that, therefore, under the law of the case as decided by the United States supreme court, the ratification by Maddox and his estoppel are established. Appellants state in their brief that this, their affirmative defense, was fully established. They do not recite the testimony which they claim establishes that defense, but they refer to the pages of the transcript at which they claim is found such testimony. But an examination of this testimony referred to, and the other testimony in the case does not, in our opinion, sustain the appellants' contention. This testimony does not fully establish their position. Indeed, if there is not a preponderance of the testimony against them, as it seems to us there is, there is at least a wholly substantial conflict in the evidence on this point. The respondents claim that the evidence, instead of proving an agreement between Rader, Kier and Smith as set up in the answer, does in fact prove another agreement to wit: that instead of the \$1,752.15 and the horses knocked off to Kier to be forfeited to the mortgagees, the agreement was that the money should be forfeited to the sheriff, and that the sheriff should retain the horses himself, and that the money was so taken by the sheriff to cover the expenses of a re-sale of the horses, and that the

horses were to be retained for the purpose of reselling them. We think there is ample testimony, and indeed probably a preponderance of it, to the effect that the agreement was as claimed by the respondents.

There being at least a substantial conflict of testimony upon this point, the finding of the jury cannot be disturbed on this ground.

And it is, therefore, for the purposes of this review, not true that the defense set up by the appellants was fully established. We have examined the evidence upon this point with care, and, while some of it is indefinite and while, perhaps, there are some contradictions, there is ample evidence to the effect that Smith, the agent of Maddox, did not agree that the money should be forfeited to Maddox, or that the horses should be held by the sheriff for him, but on the contrary, the most that Smith ever did as the agent of Maddox was to consent that the sheriff should receive the money to cover the expenses of a re-sale and should himself hold the horses for that purpose.

We stop to note here that Rader himself treated the transaction with Kier as a completed sale, for he proceeded to accept from Kinyon, the mortgagor, a sum of money which, together with the amounts already bid on the horses, made an amount sufficient to pay the whole mortgage debt. Upon receiving this money from Kinyon he released to Kinyon all the horses unsold, and paid to Maddox the amount of money which he had collected less the costs and expenses of making the sale. Rader's construction of that transaction seems to us perfectly clear.

We then come to the question of what, if anything, Maddox ratified by receiving from the sheriff a part payment in the sum of \$3,192.93. Maddox did not commit any act of ratification by receiving any of the horses which had been struck off to Kier, for he refused to accept them. We must bear in mind that appellants contend that Maddox thus ratified what they claim in their answers were the acts of his agent Smith, but, as observed above, the testimony did not establish that

the acts of the agent Smith were those which appellants contend they were, that is to say, there was not an agreement between Rader, Smith and Kinyon that the money paid by Kier should be forfeited to Maddox, and the horses retained on account of Maddox. It is then claimed by respondents that Maddox in receiving the money could not ratify an agreement which was not made by his agent. It is not established by the evidence that Maddox received the money with the understanding that he received it under the agreement set up in appellants' answer. The intention and understanding with which he received this money was a material fact in the case, as said in the United States supreme court in its decision, and that question was submitted, as we think properly, to the jury. We do not say that the evidence was all with the respondents on these matters, but it is certainly the fact that there was substantial testimony to sustain the verdict of the jury in these respects. It is not necessary to trace this question in its various phases as it was raised upon the trial. This statement of our conclusion is sufficient to cover the point wherever it appears in the record

There is another matter as to the law of the case upon this appeal. It is the law of the case as declared by this court, 9 Mont. 126, that by the delivery of the mortgage to the sheriff, for the purposes of selling the property, he had authority to sell only for cash. This law of the case is not disturbed by the decision of the United States supreme court. Therefore, whatever Smith as Maddox's agent may have done in agreeing, or attempting to agree, to any kind of a sale other than for cash was beyond his authority as agent. The appellants rely upon Maddox's ratification, that is to say, a ratification of that which they claim was the nature of Smith's acts. But Smith's acts in the premises, as shown by the evidence sufficient to sustain the verdict, were materially other than appellants claim they were. Therefore, if Smith agreed to that which he had no authority to agree to, he did not in any event agree to that which appellants claim he did, and therefore Maddox did not ratify such claimed agreement, because he could not ratify that

which Smith had not performed. Maddox is, therefore, not estopped. This disposes of the gist and main contention in the case.

The appellants contend that there was a departure in the pleading between the complaint and the replication. We are not of the opinion that there was any departure. But the manner in which this question was raised was by a motion to strike out a portion of the replication for the alleged reason that it was a departure from the complaint; but the motion does not pretend to point out in what the departure consisted. Under the general principles applicable to motions and the pointing out the grounds of the same, we are of opinion that the district court was justified in ignoring the motion which did not in any way indicate the grounds of the same.

There were a very great many objections to testimony. In overruling these objections appellants contend that the court erred. Almost all of the objections can be considered as properly overruled, because they do not point out the grounds upon which appellants objected. (*State v. Black*, 15 Mont. 148, with cases there cited.) It may be that some immaterial testimony was allowed in the case, and possibly some testimony that was incompetent, but as to all of it we are of opinion either that the objection was not sufficiently made, or, in the cases where it may have been sufficiently made, there was no error which was sufficiently prejudicial to justify us in reversing the judgment.

Much of the argument in the brief is made upon the instructions of the court. We are of opinion that the instructions fairly presented to the jury the issues set up in the pleadings and brought before the jury by evidence. The court instructed upon these issues consistently with the view that we have above expressed as to what was the real gist of the action.

We have discussed this appeal from the point of view of the plaintiff only. It is sufficient to say that, as appellants themselves remark, the case of the intervenor must go with that of the plaintiff. It is therefore ordered that both as to intervenor

and plaintiff the judgment and order denying a new trial are affirmed.

Affirmed.

PEMBERTON, C. J. concurs. HUNT, J., being disqualified takes no part in the foregoing opinion or decision.

HARMON, RECEIVER OF THE STOCK GROWERS' NATIONAL
BANK, OF MILES CITY, MONTANA, APPELLANT, v.
HAWKINS, AS SHERIFF OF THE COUNTY
OF CUSTER, RESPONDENT.

18	525
20	528
18	525
33	455
33	456

[Submitted September 23, 1896. Decided October 19, 1896.]

SALES OF PERSONALTY—Delivery—Replevin—Pleading.—A complaint in replevin against a sheriff who had attached certain sheep as the property of the plaintiff's vendor, which alleges a purchase of the sheep while in the possession of the vendor and his promise to herd and care for them until otherwise disposed of, but which fails to allege a delivery and change of possession at the time of the sale or prior to the attachment, is insufficient under section 292, fifth division of the compiled statutes, requiring an immediate delivery accompanied by an actual and continued change of possession in order to constitute a sale of personalty valid as against creditors of the vendor.

Appeal from Seventh Judicial District, Custer County.

CONVERSION. Judgment was rendered for the plaintiff below by MILBURN, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action for damages for the alleged conversion of personal property. It is alleged in the complaint that the sheep in question were purchased by E. E. Batchelor, as trustee of the plaintiff bank. The sheep, it is alleged, were at the time of the alleged purchase in the possession of one Dan H. Bowman; that the said Bowman was at the time of the alleged purchase notified by Batchelor of the same; that Bowman received the sheep from said Batchelor, and agreed to herd and care for the same until they were otherwise disposed of. The sheep were purchased by Batchelor from said Bowman and one Merrill.

It seems, from the imperfect record of the case, that there was a trial of some sort, of the case, before the court without a jury. Pending the trial the plaintiff asked and obtained leave of court to amend the complaint by interlining therein words showing that Batchelor purchased the sheep as trustee of the plaintiff. This continued the case, and the court granted defendant time and leave to demur to or answer the amended complaint. The defendant demurred on the ground that the amended complaint did not state facts sufficient to constitute a cause of action, and also on the ground that the amended complaint was inconsistent with the former complaints filed by plaintiff.

The court sustained the demurrer. Plaintiff declined to amend the complaint, whereupon judgment was entered in favor of defendant for costs. Plaintiff appeals from the judgment.

Charles H. Loud, for Appellant.

Strevell & Porter, for Respondent.

PEMBERTON, C. J.—The sheep in controversy, as shown by the complaint, were, at the time it is alleged Batchelor purchased them of Bowman and Merrill, all in the possession of Bowman. It is nowhere alleged that Bowman and Merrill, or either of them, ever delivered the sheep to Batchelor. The most that can be claimed is that when Batchelor purchased the sheep they were in the possession of Bowman, and that they were permitted to remain in his possession upon his alleged promise to herd and care for them until they were otherwise disposed of. It is not alleged that there ever was an actual delivery of the sheep to Batchelor by Bowman and Merrill or either of them. There is no allegation in the complaint that there was a change of possession at the time Batchelor purchased the sheep or at any other time before they were attached by the defendant. The defendant is the sheriff of Custer county, and attached the sheep, in possession of Bowman, as such officer in a suit by one Jordan against said Merrill, and afterwards

sold the sheep under an execution issued out of the district court of said county in said suit. These facts constitute the conversion alleged in the complaint.

It is stated in the brief of counsel for the respondent that the court held the complaint bad because of the want of an averment therein that Batchelor ever took actual possession of the sheep under his alleged purchase from Bowman and Merrill. Section 226, div. 5, Compiled Statutes 1887, under which this case was tried, is as follows:

“Every sale made by a vendor of goods and chattels in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by the immediate delivery, and be followed by an actual and continued change of possession of the thing sold and assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the person making such assignments, or subsequent purchasers in good faith.”

We think the allegations of the complaint fall far short of stating facts sufficient to constitute an immediate delivery, and an actual and continued change of possession, of the sheep, as required by said statute, in order to constitute the sale to Batchelor valid against creditors and subsequent purchasers in good faith.

The action of the court in sustaining the demurrer to the complaint is the only error assigned. We see no error in the action of the court. The judgment appealed from is affirmed.

Affirmed.

DE WITT and HUNT, JJ., concur.

BARDWELL ET AL., APPELLANTS, v. ANDERSON, ET AL. RESPONDENTS.

[Submitted October 1, 1896. Decided October 19, 1896.]

NEW TRIAL—Errors of law—Specifications—Sufficiency.—A specification in an action to foreclose a mechanic's lien, that the court erred in finding that the plaintiff's assignor was in any way incapacitated from making a contract with the defendant contractor to furnish the materials described in plaintiff's complaint to the C. & L. building by reason of any relations existing between him and C. & L. defendants, and the evidence herein wholly fails to sustain the finding of the court in this particular, is wholly insufficient under section 298 of the Code of Civil Procedure (1887) as a specification of an error of law, for if in so finding there is any cause for complaint it is not that there was any error of law but that the evidence did not sustain the finding. And if the language used be regarded as a specification of insufficiency of the evidence it is wholly bad in failing to point out the particulars in which the evidence is insufficient. (*First National Bank v. Roberts*, 9 Mont. 323; *Zickler v. Deegan*, 16 Mont. 198, cited.)

SAME—Insufficiency of evidence—Specifications.—A specification that "the findings of the court to the effect that the value of the materials described in the complaint had not been sufficiently proven, are unsupported by the evidence and in direct conflict with the same and are one of the errors specified by the plaintiffs herein," is wholly bad as a specification as to the insufficiency of the evidence in that it fails to point out the particulars in which the insufficiency consists as required by section 298 of the Code of Civil Procedure (1887).

Appeal from Eighth Judicial District, Cascade County.

ACTION to foreclose mechanic's lien. Judgment was rendered for the defendants below by BENTON, J. Affirmed.

Thos. E. Brady and *F. A. Merrill*, for Appellants.

Wm. T. Piggott, *Ransom Cooper* and *J. A. Hoffman*, for Respondents.

DE WITT, J.—This is an action upon an account and to foreclose a mechanic's lien. The plaintiffs are assignees of the account and the lien of F. M. Morgan, who furnished material to the defendant Anderson, a contractor, to go into the building of defendants Collins and Lepley. The case was tried to the court without a jury. The court found for the defendants who were served, to-wit, Collins and Lepley. Plaintiffs moved for a new trial, which was denied, and appeal now from that order, and from the judgment.

18 528
24 492

18 528
27 534

18 528
30 576
30 877

18 528
29 333
18 528
32 325

The points discussed by counsel are those made upon the motion for a new trial. At the outset, the respondents stand firmly upon their position that upon the motion for a new trial there was no sufficient specification of errors of law or insufficiency of evidence. As remarked in *Zickler v. Deegan*, 16 Mont. at page 200, this court has been lenient in entertaining appeals where the specifications were, perhaps, not wholly what they should be. But we cannot ignore the objections made to these specifications. A particular point is made upon them by respondents. We must therefore examine their alleged insufficiency.

The court made no findings whatever. It simply held generally for the defendants. There being no jury trial, and thus no instructions, therefore the view which the court took of the law is not clearly apparent. The statement on motion for new trial opens with the recital that the court gave judgment in favor of the defendants, and then proceeds to what the moving parties claim are the specifications of error. They state as follows:

"In reaching said conclusion and the rendition of said judgment, the court erred in the following particulars, all of which were excepted to by the plaintiffs, to-wit." Then follow 11 paragraphs. We will take the first as example. It is as follows:

"The court erred in finding that F. M. Morgan was in any way incapacitated from making a contract with H. A. Anderson, the contractor, to furnish the materials described in plaintiff's complaint to the Collins and Lepley building, by reason of any relation existing between him and Collins and Lepley, the defendants; and the evidence herein fails wholly to sustain the finding of the court in this particular."

This purports to be a specification of an error of law. It is not an error of law at all. The practitioner is complaining that the court found that which he states the evidence wholly fails to sustain. In so finding, if there is any cause for complaint, it is not that there was any error of law, but, on the other hand, it would be that the evidence did not sustain the

finding. Our statute provides (Code Civil Procedure 1887, § 298, subdivision 3) as follows:

“When the notice for the motion designates, as the ground of motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of motion, errors in law occurring at the trial, excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion.”

As to this matter, Mr. Hayne, in his book on New Trial and Appeal, says, at page 426, § 149: “And it is to be observed that specifications of errors of law are not to be confounded with specifications of the insufficiency of the evidence. An instance of this is to be found in *Smith v. Christian*, 47 Cal. 18. In that case the specification was as follows: ‘Defendant specifies the following particulars *in which the court erred*: The testimony shows that the award is void, it having been made by an umpire selected by lot. The testimony or pleadings, as admitted, show that the segregation of the award was without authority; that, by the submission, it was only provided for awarding damages in the aggregate, if any, and the arbitrators had no authority to determine what each party should pay. There was no subsequent promise to pay. There was no consideration to support any such promise if made.’ This was held to be insufficient, and the court said: ‘These specifications cannot be considered to be specifications of the particulars in which the *evidence* was insufficient, because they are not stated to be such. On the contrary, they are expressly set forth as being *errors in law*,—“particulars in which the court erred.”’

But it is clear that the matters thus set forth do not constitute errors of law. It is not an error of law that the evidence is insufficient to justify a particular finding of fact.’” (See, also, section 150.) The case which Mr. Hayne cites, *Smith v. Christian*, is affirmed in *Heilbron v. Ditch Co.*, 76 Cal. 10, 17 Pac. 932; *Nichols v. Jones*, 14 Colo. 60, 23 Pac. 89; *Cunnington v. Scott*, 4 Utah, 446, 11 Pac. 578.

Applying these principles to the specification before us, we find that it is wholly insufficient as a specification of an error of law, because it does not describe in any way an error of law.

If the court were inclined to take a loose view of the subject, and say that, while the counsel has pretended to specify an error of law, we will still consider his language as a specification of insufficiency of the evidence, even then the specification would be wholly bad, for the reason that it simply states, "The evidence herein fails wholly to sustain the finding of the court in this particular." This would be bad even as a specification of insufficiency. (*First National Bank v. Roberts*, 9 Mont. 323; *Zickler v. Deegar*, 16 Mont. 198.)

We will quote a few more of the specifications to illustrate their insufficiency :

"(2) The court erred in finding that there was any fraud perpetrated upon the defendants Collins and Lepley by reason of the transaction set forth in plaintiffs' complaint between F. M. Morgan and the defendant H. A. Anderson, which fraud would in any way be to the injury of the defendants Collins and Lepley.

"(3) The court erred in holding that the agreement between F. M. Morgan, the assignor of plaintiffs' lien and H. A. Anderson, was a void transaction as between F. M. Morgan and the defendants Collins and Lepley, instead of being, at most, a voidable transaction.

"(4) The court erred in holding that the defendants Collins and Lepley were entitled to a dismissal of this action, or had any defense to the claim of the plaintiffs herein, without having first paid plaintiffs the reasonable value of the lumber and materials used in the construction of their building or the return of said materials, and that their retention of said materials was not a waiver of any rights they might have to repudiate said contract.

"(5) The court erred in finding that the defendants Collins and Lepley, and particularly Timothy E. Collins, who had the management and control of the erection of this building for Lepley and himself, were not aware that F. M. Morgan was

furnishing to Anderson the materials described in the complaint, as the evidence plainly shows that he (Collins) did know it, and neither he nor Lepley ever objected to Morgan carrying out said contract, but expressly ratified such action, as the evidence appears, by paying to Morgan the moneys he had expended in payment of freight upon these materials, and also by paying him moneys which he claimed due at the same time for several materials that he furnished to the contractor Anderson.

“(6) The court erred in finding that the plaintiffs had not proved all the issues set up by the pleadings in favor of the plaintiffs.”

While these specifications pretend to point out an error of law, they have to do not at all with the law, but wholly with the facts. Specification No. 10, perhaps, is an assignment of insufficiency. It reads as follows:

“The findings of the court to the effect that the value of the materials described in the complaint had not been sufficiently proven are unsupported by the evidence, and in direct conflict with the same, and are one of the errors specified by the plaintiffs herein.”

This is plainly a specification as to the insufficiency of the evidence, and an inspection of it shows that, as such a specification, it is clearly bad. (See Montana cases above cited.)

The district court was justified in ignoring these specifications, and we must sustain its action in denying a new trial.

This disposes of all that is sought to be brought before us on this appeal. The plaintiffs do not contend that they were entitled upon the trial to a personal judgment against the contractor Anderson, for the reason that he had not been served with summons, and never appeared in the case. The judgment and order denying a new trial will therefore have to be affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

MURRAY ET AL., RESPONDENTS, v. SWANSON, ET AL.,
APPELLANTS.

18	533
19	40

[Submitted October 6, 1896. Decided October 19, 1896.]

MECHANIC'S LIEN—Mortgage—Precedence between.—Under section 1374, fifth division compiled statutes, providing that liens for work or labor done or materials furnished shall be prior to, and have precedence over, any mortgage, incumbrance or other lien made subsequent to the commencement of work on any contract for the erection of such building, structure or other improvement, a lien for plastering takes precedence to a mortgage given after the commencement of work on various contracts for the erection of the building, although the plastering was not done until after the date of the mortgage. (*Mason v. Germaine*, 1 Mont. 263; *Merrigan v. English*, 9 Mont. 113, cited.)

SAME—Attorney's fee—Costs in supreme court.—The act of March 14, 1889, (16th session) allowing the plaintiff in an action for the foreclosure of a mechanic's lien reasonable attorney's fee as costs, has application only to the court in which the action is instituted and does not authorize the allowance of an attorney's fee as part of the costs in the supreme court.

Appeal from Second Judicial District, Silver Bow County.

ACTION to foreclose a mechanic's lien. Judgment was rendered for the plaintiff below by SPEER, J. Affirmed.

Statement of the case by the justice delivering the opinion.

This is an action by Murray Bros., co-partners, to foreclose a mechanic's lien on certain property formerly owned by the defendant Swanson, and to have the claims or liens of the other defendants declared inferior to the lien of plaintiffs. The defendants defaulted, except S. H. Stuart, the appellant, who held the mortgage on the premises covered by the liens. The complaint alleged the performance of the work for which the plaintiff's claimed a lien, alleged its reasonable value, and prayed for a reasonable attorney's fee. It is admitted by the pleadings that plaintiffs' lien was filed for plastering a frame building owned by Sadie Swanson at the time the work was performed; the plastering having been done between the 5th and 15th days of December, 1892.

The amended complaint averred that S. H. Stuart claimed a lien by virtue of a mortgage given to him by Sadie Swanson,

dated November 24, 1892. It was also alleged that the mortgage was given after the commencement of the work on various contracts for the erection of the building situated upon the premises described in the lien.

The answer raised the question whether the mortgage of Stuart was a prior lien on the property, and whether it was entitled to precede the lien of the plaintiffs. The plaintiffs moved for judgment on the pleadings. This motion was sustained, and judgment ordered for the plaintiffs, and decree entered adjudging the lien set up in the plaintiff's complaint to be superior and paramount to the interest of the mortgagee, Stuart, and awarding the plaintiffs \$50 attorney's fees. The appeal is from the judgment.

Chas. O'Donnell, for Appellant.

C. R. Leonard, for Respondents.

HUNT, J.—The portion of section 1374, division 5, general laws, 1887, applicable to the present controversy, is as follows: "The liens for work or labor done, or material furnished, as specified in this chapter, shall be prior to and have precedence over any mortgage, incumbrance or other lien made subsequent to the commencement of work on any contract for the erection of such building, structure or other improvement."

A former statute of the territory of Montana provided that "The liens for work or labor done * * * shall have priority * * * and shall be preferred to all other liens and incumbrances which may be attached * * * to the extent aforesaid * * * made subsequent to the commencement of said building, erection or other improvement." (Gen. Laws 1879, div. 5, § 827.)

In *Davis v. Bilsland*, 18 Wall. 659, the supreme court of the United States decided that, under this statute quoted above, liens secured to mechanics and material men had precedence over all other incumbrances put upon the property after the commencement of the building. This construction

of the statute was regarded as just, the court there saying, "why should a purchaser or lender have the benefit of the labor and materials which go into the property, and give it its existence and value?"

The same view of the statute was taken by the supreme court of the territory in *Mason v. Germaine*, 1 Mont. 263, where the court were of opinion that the statute expressly gave preference to liens of mechanics and material men over any encumbrance made subsequent to the commencement of the building. It will be observed that there is a difference in the wording of the statute construed in *Davis v. Bilsland*, *supra*, and section 1374, quoted above. The latter reads thus, "Subsequent to the commencement of work on any contract for the erection of such building, structure or other improvement;" while the former reads, "subsequent to the commencement of said building, erection or other improvement." But this difference is expressly referred to and commented upon in *Merrigan v. English*, 9 Mont. 113, where Justice Bach, for the court, said:

"But there is no difference in the meaning. When Crawford commenced to erect the building, work was commenced on a contract for the erection of the building; in other words, that was 'the commencement of the building.' Such a construction of the statute as is stated in the case last cited is not unjust. The mortgagee knew the law. He knew, or could have known, that work had been commenced on a contract for the erection of a building. He knew that persons other than the original contractor would perform work and labor which would improve the property upon which, as security, he advanced the money. He knew of the lien which such subcontractor could acquire. To hold otherwise would be to destroy the very purpose of this law, which was to give to the subcontractor a direct lien for the value of his labor, because it is evident, if the contrary was held, such liens would be made worse than a farce by so-called blanket mortgages filed the day after the improvement was commenced."

The case is therefore, upon this point, determined by these

former constructions of the Montana lien statutes, and the court properly adjudged the mortgage a subsequent lien to that of plaintiffs.

The district court allowed the respondents \$50 attorney's fee, as part of the costs. This was authorized by act of the sixteenth legislative assembly, approved March 14, 1889. (*Wortman v. Kleinschmidt*, 12 Mont. 316.) Respondents' counsel now asks this court to allow him, as costs, a reasonable fee for his services in the supreme court.

The only question involved is whether the statute referred to, allowed attorney's fees as part of the costs in the supreme court, as well as the district court. Upon the general principle that costs are recoverable at law only by force of statute, and depend upon the terms of the statute strictly construed, we do not find authority in the statute to allow counsel fees in the supreme court. The statute is a severe one, at best, and ought to be strictly construed. We therefore think that its application should govern attorney's fees taxable as costs only in the court in which the action is instituted. Judgment affirmed.

Affirmed.

PEMBERTON, C. J. concurs. DE WITT, J.: I concur in the judgment, but in the allowance of the attorney's fee in the district court only on the ground of *stare decisis* and *res adjudicata*. (*Wortman v. Kleinschmidt*, 12 Mont. 316 ; *Helena S. H. & S. Co. v. Wells*, 16 Mont. 65.)

CASCADE COUNTY, RESPONDENT, v. CITY OF GREAT FALLS, APPELLANT.

[Submitted October 7, 1896. Decided October 19, 1896.]

STREETS AND HIGHWAYS—Bridge—Repairs.—Where the limits of a city are extended to the opposite side of a river so as to embrace a bridge then owned by the county, the bridge becomes part of the city street by which it is approached and thereby ceases to be within any road district as established by the county, or under the control of county officers, but falls within the jurisdiction of the city officers by whom it should be kept in repair. (Sections 325, subd. 10, 419, 435, 1842, 1852-1854, fifth div. Compiled Statutes.)

Appeal from Eighth Judicial District, Cascade County.

ACTION to determine the liability of the city for repairs on a bridge within the city limits. Submitted on an agreed statement of facts. Judgment was rendered for the county by BENTON, J. Affirmed.

Statement of the case by the court.

The controversy for determination is whether the city of Great Falls or the county of Cascade is liable to repair and maintain a wagon bridge spanning the Missouri river in that city. The case was submitted to the district court upon an agreed statement of facts, as provided by statute. The court rendered a judgment in favor of the county. The city appeals.

An epitome of the facts is as follows: In 1888 a private corporation built the bridge. At that time, the city of Great Falls extended to the river and bridge, but did not include the bridge. In 1890 the county bought the bridge from the private corporation. In 1892 the county replanked the bridge, and insured the same for a period of three years in favor of the county. In 1891 the said city of Great Falls, pursuant to the laws governing municipal corporations, extended its limits to the other side of the river, so that the city now includes the bridge and its approaches on both sides. There are some

other facts stated, which, however, are not material to the controversy. The bridge is in a bad state of repair, and both the county and city refuse to repair it. The question for determination is simply whether the city or the county is liable for said repairs.

The statutes of the state which are material to the inquiry are as follows:

Section 325, div. 5, Compiled Statutes, reads as follows: "The city council of all cities incorporated under this act shall have the following powers: * * * (10) To lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks and public grounds, and vacate the same; to provide for lighting and cleaning the streets, alleys, avenues; to regulate the use of sidewalks, and require the owners of the premises adjoining to keep the same free from snow or other obstruction; to regulate the depositing of ashes, garbage or other offensive matter in any street, alley or on public grounds; to provide for and regulate street crossings, curbs and gutters; to regulate and prevent the use or obstruction of streets, sidewalks and public grounds, by signs, telegraph poles, posting hand-bills and advertisements.

Other sections are as follows:

"Section 419. The city council shall have power to condemn and appropriate private property for opening, establishing, widening or altering any public street, avenue, alley, lane, park, sewer, waterway, or for any other public use, and the resolution or ordinance of the city council ordering, directing, authorizing or providing for the taking of private property for any such use shall be conclusive as to the necessity for such taking.

"Section 1842. It shall be the duty of the board of county commissioners at each session thereof to apportion the amount of money in the treasury available for road purposes to the several road districts, and notify the road supervisor of the amount subject to his order, and in no case shall any supervisor be allowed to draw more money than is apportioned to said district.

“Section 1852. It shall be competent for the municipal authorities of any town or city incorporated under the laws of this state to provide by ordinance for the levy and collection of a tax of not exceeding two mills on the dollar on all taxable property within the corporate limits of such town or city, and also a special tax of three dollars on each able bodied man between the ages of twenty-one and forty-five years, residing within the corporate limits of such town or city, which shall constitute a street fund, and shall be expended in opening, improving and keeping in repair the streets and alleys of such town or city.

“Sec. 1853. All ordinances for the levy and collection of street taxes, either special or *ad valorem*, shall provide that persons liable to pay the same may work out such taxes if they elect so to do, under the direction of the street commissioner or supervisor of such town or city, upon the streets thereof, and shall provide for giving notice of the time and place when and where such work shall be required to be done.

‘ Section 1854. Whenever any such town or city shall provide by ordinance for the levy and collection of such street taxes, no further or other road tax shall be levied or collected by the county treasurer of the county in which such town or city is situated, of or from the residents thereof, nor shall any portion of the road taxes collected in the county be expended upon the streets or alleys of such corporate town or city, and thirty per cent. of the *ad valorem* tax collected under and by virtue of any such ordinance shall be paid into the county treasury by the city treasurer, and so much of said thirty per cent. as may be necessary shall be apportioned to the road district in which such town or city is situated, to be expended on roads of said district outside town limits, and the surplus, if any, shall, be for the credit of the general road fund.

“Section 435. No parts of the streets of any city shall be in any road district established by the county commissioners, nor be under the control of any county officers. No overseer of highways shall be elected in and for such city, but the poll tax shall be collected as hereinafter provided, and shall be

expended on the streets, highways and public places governed by the city council and officers of their appointment.'"

Sam Stephenson, for Appellant.

H. J. Haskell, for Respondent.

PER CURIAM.—When the bridge was purchased by the county from the private corporation, it was made a free public bridge. A public bridge is part of the highway. (11 Am. & Eng. Ency. Law, 541; Elliott, Roads & S. p. 21, *et seq.*; Morrill, City Neg. p. 69, *et seq.*, and numerous cases cited in these text books.)

We are of opinion that the statutes quoted in the statement foregoing are decisive of this case. A bridge, being a part of the street, cannot be in any road district established by the county, nor can it be under the control of any county officer. (Compiled Statutes, div. 5, § 435.) It is within the jurisdiction of the city officers. (Id. § 325, Subd. 10; Id. § 419.) Sections 1852 to 1854 provide for the raising of funds by the city for repairing the streets.

The reports are full of cases deciding these questions, but they are not of special interest in this controversy, for the reason, as above noted, that it clearly appears that the statutes are conclusive.

The judgment of the district court will therefore be affirmed.

Affirmed.

STATE EX REL. RUSSEL, ET AL., v. TOOKER, COUNTY CLERK AND RECORDER OF LEWIS AND CLARKE COUNTY.

[Submitted October 17, 1896. Decided October 22, 1896.]

ELECTIONS—*Nomination by petition.*—A list of persons cannot be placed upon the official ballot as candidates of a so-called Silver Republican party upon a petition filed with the county clerk nominating such persons for their respective offices as candidates of such party. (*State ex rel. Woody v. Rotwill, ante*, 502, cited.)

SAME—*Nomination by certificate of a committee.*—The nomination of a list of persons as candidates of a so-called Silver Republican party by a certificate filed with the county clerk purporting to certify their nomination as by the central committee

18	540
18	553
19	386
18	540
24	882
24	437
24	445
24	561
18	540
31	236
31	309

of the Silver Republican party is ineffectual where no convention held by such party had ever delegated this power to a committee. (*State ex rel. Pigott v. Benton*, 18 Mont. 306, cited.)

SAME—Nomination by members of a political club.—A certificate purporting upon its face to be that of a county convention of the Silver Republican party and nominating a county ticket composed of Republicans, Silver Republicans, Democrats and Populists, is insufficient to authorize the placing of their names upon the official ballot, where it appeared that the nominations were in fact made at a meeting of some fifty members of a Silver Republican club having four hundred members; that the officers signing the certificates were the presiding officer and secretary of the club; that no primaries were ever held; no call for a convention ever made; nor any person ever elected as a delegate to a convention, or notice given that a convention was to be held,—since such proceedings were not those of an organized assemblage of delegates representing a political party within the meaning of section 1310 of the Political Code.

EQUITY—Prayer for judgment.—The judgment in an equity case is not controlled by the prayer for relief. (*Davis v. Davis*, 9 Mont. 268; *Kietzschmidt v. Steele*, 15 Mont. 188, cited.)

ORIGINAL PROCEEDING. Application for an injunction.
Writ granted.

E. D. Weed and *O. T. Crane*, for Relators.

T. C. Bach, *E. C. Boom* and *J. W. Kinsley*, for Respondent.

DE WITT, J.—This action is brought in this court to restrain the county clerk and recorder of Lewis and Clarke county from printing on the official ballot, to be voted at the next election, the names of certain persons as candidates for the Silver Republican party, which names were certified to the county clerk as of persons having been nominated as candidates of that party by methods which relator asserts are illegal.

Objections are made by respondent's counsel to the form of this action. It is argued by relator, however, that the action is properly brought under the authority of *Chumasero v. Potts*, 2 Mont. 242; *Territory ex rel. Tanner v. Potts*, 3 Mont. 364, and other later decisions of this court. If the action is not properly brought, and upon investigation we should be obliged to so hold, the result would be that a new proceeding must be commenced in order to obtain a judgment on the merits. The same remarks apply to five other election ballot cases which are now (October 22d) before us and the hearing of which has occupied us all of the last four days.

These are cases of great public interest. Counsel inform us that the ballots must be published to-morrow and that there is barely time to print them. For these reasons we shall approve the form of the actions, *pro forma*, but shall not consider this decision as to this matter of practice binding in the future if the question shall be at any time fully argued and we have time to deliberately consider it. Public policy and public interest demand an immediate decision of this case on the merits and justify us in thus passing the question of practice.

It was attempted to get the names of a certain list of persons upon the official ballot of Lewis and Clarke county by three different methods.

First : ' A petition was filed with the respondent clerk and recorder nominating these persons for their respective offices as candidates of the Silver Republican party. The nominations could not be made by this method, and the procedure did not entitle these persons to be placed upon the official ticket as candidates of the Silver Republican party. (*State ex rel. Woody v. Rotwitt, ante*, p. 502.)

Second : A certificate was filed nominating these same persons, and purporting to certify their nomination as by the county central committee of the Silver Republican party. But no convention of the Silver Republican party had ever delegated this power to a committee. (*State ex rel. Pigott v. Benton*, 13 Mont. 306.) This committee, therefore, had no power delegated to them from the convention of their party. There was some attempt to show that this committee derived this power by delegation from the chairman of the state central committee of the Silver Republican party to the member of that committee in and for the county of Lewis and Clarke, and from that member to the county central committee of the Silver Republican party. Testimony was taken by us upon disputed questions of fact, and among other things the chairman of the state committee testified that he did not delegate to the member of Lewis and Clarke county the power to nominate a county ticket, nor did he consider that he had power to delegate such authority in local affairs.

This disposes of the alleged nomination by petition and by the central committee. They are each wholly invalid.

Third : A certificate was filed nominating these same persons, purporting upon its face to be that of a county convention of the Silver Republican party. Upon this alleged certificate respondent's counsel relies. The question then remains for decision whether the alleged county convention, purporting to nominate these persons, was in fact a convention of the Silver Republican party of the county of Lewis and Clarke. Upon this question evidence was taken.

We think that the only question before us is whether these persons are entitled to go upon the ballot as party nominees, that is, as candidates of the Silver Republican party. (*State ex rel. Woody v. Rotwitt, ante*, p. 502.) The question of their going upon the ballot as independents or as non-party candidates we do not think is before us. Every fact in the pleadings and evidence contradicts any suggestion that any one pretended that these persons were independents or non-party candidates. There is not a syllable in the testimony to indicate that the persons endeavoring to make these nominations ever intended to attempt to place their candidates upon the ballot as independents.

The questions then remain : Did a party convention nominate these people? Section 1310 of the Political Code is as follows :

“Any convention or primary meeting held for the purpose of making nominations to public office, or the number of electors required in this chapter, may nominate candidates for public office to be filled by election in the state. A convention or primary meeting within the meaning of this chapter is an organized assemblage of electors or delegates representing a political party or principle.”

We are of opinion that the only reasonable view of the evidence is that these alleged candidates were nominated simply by a political club in the city of Helena, county of Lewis and Clarke, called “the Republican Silver Club.” We have before us the minutes of the club, and the evidence of persons and

members who were present at the proceedings. It is perfectly apparent that the club in acting was not a convention representing the Silver Republican party, nor indeed did those persons participating in the proceedings consider themselves a convention. There is not a minute of a convention. The minutes are all of the Silver Republican club. To be sure, witnesses on the stand make statements that the Silver Republican club of Helena and the Silver Republican party were one and the same thing ; but we look beyond bare statements and forms of speech, and endeavor to arrive at the real substance of the proceedings. We find that the officers acted as officers of the club, and did not pretend to be officers of a convention. No primaries were ever held. No call for a convention was ever made, nor was any person ever elected as a delegate to a convention, and no notice was given that a convention was to be held. It is in evidence that a daily newspaper in Helena published as news items the proceedings and intentions of this club ; but these were simply narrations by a newspaper reporter and published as news. To pretend that such news items were notices of a convention, seems to us to reach the point of absurdity. It is claimed that a banner was strung across the street which gave notice ; but the banner was an ordinary political one giving the name of the club and stating that it met every Wednesday evening. It is a very violent stretch of imagination to pretend to call this a notice of a convention. To construe the proceedings of this club as a convention is contrary to all ideas of political conventions among the American people. The Silver Republican party, it was stated in the evidence, was a wing of the Republican party. If it were a wing it naturally inherited the political practices of the republican party. No one pretends that the Republican party had any such usages or customs, or ever held conventions in any such manner as this. Upon this question the evidence of the presiding officer of the club, Mr. Reece, is interesting. It was he who signed as chairman the certificate of nomination. After his signature appear these words, "chairman and presiding officer of said convention or organized assemblage of electors of the Silver

Republican party ; business : land attorney ; business address : Helena, Montana." The signature was shown to the witness and he testified that he did not know what he signed ; that Mr. Kinsley asked him to sign it ; that he did so hurriedly as he was leaving his office. This question was asked : "Had you any idea that evening during the whole process of the meeting that it was anything else than a meeting of the Silver Republican Club?" Answer : "My understanding was that it was a meeting of the Silver Republican club." Question : "When did you first know that it was called a convention?" Answer : "After the certificate was filed." He stated further that he did not believe he was presiding over a convention, and that he did not know that any was called. In reply to a question by one of the justices, he said : "I did understand that it was a certificate ; that these persons were the nominees of the Silver Republicans, but I did not understand that I presided over a Silver Republican convention." This testimony, let it be remembered, was that of the presiding officer of the club and the officer who signed the certificate of nomination filed with the county clerk. And we are asked to call this sort of a proceeding a party county convention! We decline to do so. No matter with what force some of the members of the club assert that the club and the party were the same thing, still when we reach the real substance of the whole proceedings it seems to us wholly absurd to contend that this proceeding was a convention.

Furthermore, it appears that the Silver Republican club has some 400 members. These proceedings were participated in by 30 to 50 members. It is claimed that this was the action of a political party. We have evidence before us of what the Silver Republican party is claimed to be, and what are a so-called Silver Republican's political principles. These principles are stated by witnesses to be simply that a Silver Republican is one who has been a Republican and who endorses the whole of the national Republican platform of 1896, except the financial plank ; and as to the financial question, his position is the advocacy of the free and unlimited coinage of silver at the

ratio of 16 to 1 by the United States, independent of any other nation. Such is the evidence before us, and such, for the purposes of this case, must be considered the fact. We do not pretend to deny the right of a political party in convention assembled to nominate a ticket composed of members of its own party, and also those of other parties, but we think natural presumption from history is that as a rule political conventions nominate candidates from the ranks of their own party. But the alleged convention in this case nominated a ticket composed of Republicans, Silver Republicans, Democrats and Populists. A very large majority of this ticket, that is to say, a majority of 16 to 8, was of men other than Silver Republicans, and of men already in nomination upon the Republican, Democratic and Populist county tickets. We are of opinion, therefore, that this is additional evidence tending to show that the assembly which nominated the persons in question was not a convention of the Silver Republican party. Let it be remembered that we do not question the right of a convention to make such nominations if they please ; but when the question in controversy is whether or not an assemblage was a convention, the fact that it has done that which is wholly contrary to the history of political conventions is some evidence against the claims of the assemblage to be a convention. For when it nominates a vast majority of its candidates from among the ranks of its enemies, it is doing that which is at least extraordinary as convention action.

The respondent's counsel earnestly argue that any number of men however small, may organize a political party. This will not be denied at this time or place. But that is not the question for consideration. The question here is whether or not a political party held a convention. We have stated above our reasons for holding that the evidence shows that this was not a convention under the statute, or under the usages or customs of political parties.

It must be remembered that this is an action in equity and that this court is sitting as an equity court. It is our duty to arrive at the real substance of things. These cases must each

stand upon their own facts—a doctrine to which we gave particular emphasis in *Stackpole v. Hallahan*, 16 Mont. 40. Regarding the real facts of this case as they have been presented to us by the pleadings and by the evidence, we cannot in any equity or good conscience, concede that the assemblage which nominated these persons was in any sense a county convention of the Silver Republican party. It seems to have been sought by the respondent to show by the evidence which the counsel introduced that the alleged convention under consideration was a parallel to the state convention, which convention representing all the electors of the state, deliberately and formally divided itself into two conventions, which two conventions each then proceeded to nominate presidential electors and a congressman. The facts in regard to the state convention were introduced in evidence. But without discussing them at any length at this time we will leave them with the remark that the facts in regard to the state convention are very widely distinguished from the proceedings of the assemblage which nominated these persons under consideration.

The judgment in equity cases is not controlled by the prayer for relief. (*Davis v. Davis*, 9 Mont. p. 268; *Kleinschmidt v. Steele*, 15 Mont. 188.)

We are of opinion that the facts shown entitle the plaintiff to an injunction restraining the county clerk and recorder from placing upon the official ballot, as candidates of the silver republican party, all those persons named in the pretended certificate of nomination, signed by F. L. Reece as chairman, and W. J. McHaffie as secretary; and also such persons as pretended to be nominated by petition of electors and by certificate of the Silver Republican party central committee, that is to say, all those persons who were named in said three certificates, copies of which are annexed to relator's complaint as exhibits.

Let the writ of injunction therefore be made perpetual to the foregoing effect.

Writ Granted.

PEMBERTON, C. J., and HUNT, J., concur.

18 548
18 555
18 548
24 392
24 393
24 437
24 445
24 561
18 548
31 239

STATE EX REL. METCALF, v. JOHNSON, COUNTY CLERK OF SILVER BOW COUNTY.

[Submitted, October 20, 1896. Decided October 22, 1896.]

ELECTIONS—Conventions—Validity of Nominations.—The nomination of a county ticket and presidential electors by a so-called Citizens Silver party convention is a nullity where the convention was participated in by twenty-one electors of the county who appeared in response to personal invitation and after acting as a county convention then proceeded to hold a state convention, it appearing that no call for a state convention was ever given or delegates elected to either convention, or notice published throughout the state or county of the gathering of the new party. (*State ex rel. Woody, v. Rotvitt, ante*, page 502; affirmed.)

SAME—Convention defined.—A political convention is an organized assemblage of electors or delegates representing a political party or principle. Convention representation implies a gathering of electors springing from the electors who compose a political party or adhere to a political principle. (Affirmed.)

ORIGINAL PROCEEDING. Petition for an injunction. Writ made permanent.

Thompson Campbell, for Relator.

L. J. Hamilton, F. T. McBride and J. F. Forbis, for Respondent.

HUNT, J.—The petitioner asks for an injunction to restrain the county clerk of Silver Bow county from printing upon the official ballot for that county the nominees of the Citizens Silver party as they appear by the certificates on file with the county clerk of Silver Bow county. Answer was filed and testimony heard by this court.

The facts in evidence before us are these : On October 1st, 1896, at 8 o'clock p. m., there assembled at the council chamber of the city hall, at Butte, a gathering of twenty or thirty persons, electors of Silver Bow county, Montana. These persons met in response to invitations extended by Mr. J. A. Baker and several others. The exact circumstances under which they came together were detailed by Mr. Baker as follows :

Question. Do you know whether there was any call made for this meeting ?

Answer. The manner in which this call was made was from hand to hand and from mouth to mouth.

Q. By whom?

A. By the electors of Silver Bow county.

Q. When was this call given?

A. Several days before the meeting; two days, perhaps three.

Q. Don't you know?

A. I do not know.

Q. You participated?

A. I did. I invited people perhaps three or four days before the meeting was called; I invited gentlemen whom I knew to be in sympathy with the principles of the financial plank of the party.

Q. Were any notices given to any other counties, or electors of any other counties to come in and participate?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Do you know whether anybody else gave any notice?

A. No, sir; I do not know.

Q. Don't you know that they did not?

A. Well, I can't say.

Q. Was there any notice published in the papers?

A. No, sir.

Q. Now when you did assemble, how did you determine as to who had a right in the meeting?

A. The gentlemen who did assemble were supposed to be gentlemen who were invited to the meeting and were electors of that party.

When thus assembled Mr. Wm. Thompson was elected as temporary chairman and Mr. J. A. Baker temporary secretary. These gentlemen were made permanent officers. Then the gathering appointed several committees and thereafter at once organized itself into a political party to be known as the Citizens Silver party—"the beginning," testified the secretary, "of a new national party." Directly after this important

epoch in the history of this new national organization, and without pursuing the common ceremony of a call for a convention it proceeded as a "county convention" to consider the report of a committee recommending nominations for candidates for district court judges and county officers of Silver Bow county. The report of the committee recommending certain names was adopted and a complete ticket nominated forthwith by acclamation. The county ticket so nominated was identical with the Republican county ticket, or "Auditorium ticket," and which we are not asked to disturb.

No resolutions or platform were adopted, "it appearing," the minutes recite, "to the convention from statements made in the convention that a state convention of the Citizens Silver party had been called to meet on October 1st, 1896, at the council chamber, city hall, Butte, at eight o'clock p. m. of that day and that the electors and delegates to that convention were ready to meet upon the adjournment of the county convention, and that the said state convention would probably adopt resolutions setting forth the principles of the party, it was therefore the sense of the convention that the county convention should not adopt any resolutions as a county convention, but would be bound by such resolutions as the state convention should adopt as a declaration of its principles."

The "county convention" then adjourned *sine die*.

Then at once followed a "state convention of the Citizens Silver party."

Mr. McMillan was chairman, Mr. Baker, secretary. The same gentlemen who composed the county convention made up the so-called state convention, that is to say, the persons composing the county convention simply assumed to act in a different capacity. Only one roll of delegates was kept for both conventions. It showed twenty-one names of persons as present. The body nominated Hon. Martin Maginnis, Henry L. Frank and Daniel Brown, Esqs., as presidential electors and voted to leave the balance of the State ticket blank. Resolutions favoring free coinage of silver by the United States independently of any other nation were adopted and the "state convention" adjourned.

No call for a state convention was ever given; no delegates to the state convention were ever elected by any county convention; no credentials were ever given to any such delegates by any one; no notice throughout the state or any county in it was attempted to be published by way of notice of a state gathering of this new party; and no delegates other than the twenty-one persons already referred to participated. The whole history of the party covered one short evening. It originated one minute, convened as a county convention the next, convened as a state convention the next, then promulgated its principles and adjourned. We doubt if political history records the undertaking of another so vast a work as this in so brief a time.

But now that the facts are subjected to the severe test of impartial judicial investigation, we find them wholly insufficient to sustain the action of the assemblage either in attempting to nominate county or state officials, and we are satisfied by all the evidence that the real object of the nomination of the Citizens Silver ticket was to place the Republican nominees beneath the Democratic electoral ticket. Let us grant that a new national party was organized. Yet even so, how can a few individuals coming from but one-fourth of the voting precincts of one county, without any notice to the electors of the state, organize a state convention representing such an organized party and its principles?

The very underlying principle of convention organization is in *representation*. This principle pervades every political system in our form of popular government. It was recognized in May 1787, when the federal system was revised by the Philadelphia convention of delegates from the states at the outset of the government; and has steadily grown to be a common form of giving expression to the choice of the people by whom delegates are usually chosen. As political parties have grown and become the medium of declarations of principles of electors, so the convention system has become a common part of political machinery as the means of putting candidates before the people. National party conventions have nominated presidential candi-

dates since 1832. Somewhat recently, in the growth of electoral reform, legislation has come to recognize the existence of political party conventions, and the statutes of many states, including those of Montana, have briefly put in definite form the rule that a convention is an organized assemblage of electors or delegates representing a political party or principle. This definition cannot be separated into wholly independent divisible parts. The assemblage must not only be an organized one, but the electors as well must, when so organized, represent a political party or principle. Thus a convention must be a representative body. Now, if we are right in this reasoning, this representation is of electors of the party to whom the candidates of the convention are to be submitted for election to office. And this representation must be what the statute implies: A gathering of electors springing from the electors who compose a political party or adhere to a political principle. If such electors fail or decline to send delegates to the convention, or if the delegates sent disagree or act unwisely, then other matters may arise; but there can be no representation without the presence of electors fairly representing the party, or without some opportunity having been given to the electors to say whether or not they desire their party or principle to be represented. This was the doctrine of the *Woody* case, *ante* p. 502, and is now reaffirmed. Here, in this case, we find an attempted state convention of an organized party, made up of a few persons, without credentials, voluntarily coming from but nine precincts of one county in a great state and no attempt at giving to the electors of the party in other precincts or counties a chance to participate in the assemblage! The whole theory of representation as fairly intended by the law was entirely ignored. The vigorous authority of the electors of the party was lacking, and unless relief is granted in such cases, the voters of the state who are members of an existing political party, may be confronted with a ballot containing the names of persons in whose nomination they had no opportunity whatever to take part by delegate representation. We cannot assent to such a method as a convention nomination of candidates.

A political convention is to a certain extent a law unto itself and the right to assemble in convention is one that must always be upheld, but whether there has been a convention with authority to nominate candidates is, under conditions of fact, one that must be determined by applying the statute law of the state. The duty of the court, therefore, in this case is to subject the methods employed to form a convention to such examination as any other case properly presented to a court would be. We have done so and our conclusion is that there was no state convention held and the writ must issue as prayed for.

These views apply to the so-called "county convention." The electors of the new party in Siver Bow county had no fair notice of any convention and no opportunity to be represented by delegates, and were not represented except by a few projectors of the new party. The action of the body, therefore, as a county convention cannot be sustained and it must be nullified.

All questions of practice are passed. (*State ex rel. Russell v. Tooker, ante*, p. 540.) Let the writ of injunction issued enjoining the county clerk from putting the so-called citizens silver ticket upon the official ballot be made permanent.

As it appears to the court that the secretary of state has certified the Citizens Silver party electoral ticket to all of the county clerks throughout the state, the attorney general is hereby directed to notify each and every clerk of this decision and to order them to omit the said ticket from the official ballots of their respective counties.

Writ Granted.

PEMBERTON, C. J., and DE WITT, J., concur.

STATE EX REL. McLAUGHLIN v. BAILEY, COUNTY
CLERK OF MISSOULA COUNTY.

[Submitted October 21, 1896. Decided, October 22, 1896.]

ELECTIONS—Conventions—Validity of nominations.—Where a regular Republican county convention, after completing its business adjourns *sine die*, and a portion of the members of the convention, including the presiding officer and secretary, then re-assemble as a county convention of the Silver R-publican party, which was a regularly organized political party in the state, without any call having been issued for, or any delegates elected to, such convention, its proceedings are illegal and void. (*State ex rel. Metcalf v. Johnson, ante*, 548, cited.)

ORIGINAL PROCEEDING. Petition for an injunction. Writ made permanent.

T. J. Walsh, for Relator.

M. S. Gunn, for Respondent.

PER CURIAM.—The petition shows that the petitioner is the regular nominee of the Democratic party of Missoula county for the office of sheriff to be voted for at the general election to be held on the third day of November of this year. The petitioner brings this suit for himself and the other nominees of the Democratic party for the several county offices to be filled in said county at said election. The parties in interest are all electors in said county.

The petition alleges that on the 23d day of last September a regular county convention of the Republican party was held in Missoula county for the purpose of nominating a county ticket of said party to be voted for at the general election in November next; that said convention was properly and legally called and was in all respects regular; that said convention nominated candidates for the various county offices and that a certificate of the nomination of such candidates of said party was duly filed with the county clerk of said county by the proper officers of said convention. It is alleged that said convention after completing its business adjourned *sine die*. After the adjournment of said convention it is alleged that a portion of the delegates to

such convention, including the presiding officer and secretary thereof, assembled as a convention of the Silver Republican party, proceeded to nominate the same candidates that had been nominated for county offices by the Republican convention, which had just adjourned *sine die*, as aforesaid, and that thereafter the officers of said pretended convention of the Silver Republican party filed with the county clerk a certificate of the nomination of the candidates of said Silver Republican convention. The nominees of the Republican convention and of the Silver Republican convention are identically the same persons. This proceeding is instituted to enjoin the county clerk of Missoula county from placing the ticket nominated by said Silver Republican convention on the ballot under the head of the Silver Republican party.

It is alleged in the petition that the Silver Republican party is a regularly organized political party, in the state, and has been since the tenth day of last September; that no call for the holding of said alleged convention of the Silver Republican party was ever issued or published by any one, and that no delegates were ever elected by any constituency to such convention. These facts are admitted. The only question for determination by us is as to whether this assemblage was a convention as defined by our statutes with authority to nominate a ticket. The facts in this case are substantially the same as involved in *State ex rel. Metcalf v. Johnson*, just decided by this court. In that case this court held that the action of an assemblage of persons, met together under facts and circumstances like these disclosed in this case, in assuming or attempting to nominate a ticket of the party in existence was void and of no force or effect whatever. Upon the authority of that case the writ of injunction issued in this case is made permanent.

Writ Granted.

STATE EX REL. GILLIS v. JOHNSON, COUNTY CLERK
OF SILVER BOW COUNTY.

[Submitted October 21, 1896. Decided October 22, 1896.]

ELECTIONS—Conventions—Contending factions.—Where the regularly elected delegates to a republican county convention upon assembling were unable to agree on an organization, whereupon a portion of the delegates withdrew and assembling at another place, nominated a county ticket and adopted the name of the Silver Republican party, but without any intention of forming a new party, but for the purpose of designating the party for and as a principle only, and to prevent confusion in the identity of the two tickets the court will not interfere at the instance of one faction to restrain the county clerk from placing on the official ballot the ticket nominated by the other faction. Such a contention in the ranks of regularly elected delegates will be left to the electors to determine.

ORIGINAL PROCEEDING. Petition for an injunction. Writ denied.

F. T. McBride, L. J. Hamilton and J. F. Forbis, for Relator.

Thompson Campbell', for Respondent.

PER CURIAM.—It appears in this action that the regularly elected delegates to the county Republican convention of Silver Bow county assembled pursuant to regular call, but were unable to agree on an organization, the disagreement arising when the secretary of the Republican committee attempted to call the convention to order. Confusion reigned and some violence is alleged to have occurred in the Auditorium where the delegates were gathered. Thereupon, and it is averred by reason of these acts of violence and other wrongs, certain delegates withdrew and assembled at another place, still acting it is claimed under the regular call. At this other place these delegates organized into what is claimed to be a convention, nominated a full county ticket and adopted a name, to-wit: the Silver Republican party, but it is averred with "no purpose of forming a new or other party and for the sole and only purpose of designating the party as the Silver Republican party for and as a principle only; and for the purpose further, there being another ticket nominated under the name Repub-

18	556
24	408
24	437
24	445
24	449
24	561

lican party, to designate for the information and knowledge of the electors of the state of Montana that no mistake might be made, and that there should be no confusion in the identity of the two tickets.”

Meantime the delegates who remained at the Auditorium organized and they too proceeded in convention to nominate a county ticket. We are now asked by the petitioner Gillis, who is chairman of the Republican central committee of Silver Bow county, to enjoin the county clerk from placing on the official ballot the names of those persons certified as nominated by the Silver Republican convention. No question of the right of the delegates who assembled under the call to organize a convention is presented in this case. The question is simply one of the relative rights of rival factions within the ranks of the regularly elected delegates. Such a contention under all the facts of the case it is well to leave to the electors to determine. They cannot well be misled because the names of the two factions should appear under different names on the ballot, and each faction will appear but once.

At all events we shall follow the rule laid down in *Phelps v. Piper* (Neb.) 67 N. W. 755, and decline to interfere.

The proceeding is dismissed.

STATE EX REL. MATTS, v. REEK, COUNTY CLERK OF
GRANITE COUNTY.

[Submitted October 21, 1896. Decided October 22, 1896.]

ELECTIONS—Nomination by petition—Validity.—The nomination of a person for an office as the candidate of a regularly organized party, as the Silver Republican party, cannot be made by petition although the petition was signed only by members of that party and was filed by direction of the state and county central committees of the district. Nor would such nomination be entitled to appear on the ballot in a separate column as the electors Silver Republican candidate, or as an independent nomination. (*State ex rel. Woody, v. Rotwitt, ante*, page 502, cited.)

ORIGINAL PROCEEDING. Petition for an injunction. Writ made permanent.

T. J. Walsh, for Relator.

18	557
18	560
19	286
18	557
24	437
24	561

McConnell & McConnell and *Henri J. Haskell*, Attorney General, for Respondent.

PEMBERTON, C. J.—E. D. Matts, the relator, is the regular Democratic candidate for district judge for the Third Judicial District of the state of Montana, composed of the counties of Deer Lodge and Granite. It appears also that Theodore Brantley is the regular nominee of the Republican and Populist parties for judge of said district. It also appears from the petition that Theodore Brantley was nominated by a certificate signed and filed by the electors of the Silver Republican party in the counties composing said district. This certificate was filed with the secretary of state, and the nomination of said Theodore Brantley under said certificate, has been duly certified by the secretary of state to the county clerks of Deer Lodge and Granite counties. By this petition the relator seeks to enjoin W. J. Reek, who is county clerk of Granite county, from placing the name of Theodore Brantley on the ballot as a candidate for said office under the head of the Silver Republicans. In *State ex. rel. Woody v. Rotwitt*, just decided, this court held that a party nomination could not be made by petition as is sought to be done in this case. But counsel for the defendant contends that, as the certificates of nomination in this case were signed only by Silver Republicans of the district, and that said certificates of nomination were filed under the direction of the state and county central committees of said district, it thereby became a party action and legalized such nomination of Theodore Brantley. But in answer to this it is sufficient to say if the law does not permit a nomination of a regular existing party to be made by certificate of electors, as was attempted to be done in this case, and which was so held in *State ex rel. Woody v. Rotwitt*, ante, page 502, then the direction of the central committees to the electors to so act would have no binding force or effect, or take it out of the rule laid down in *State ex rel. Woody v. Rotwitt*, by this court.

Counsel for the defendant asks if we hold the nomination of

Theodore Brantley had as a party nomination, then that we hold, "that the name of said Theodore Brantley be allowed to appear upon the ballot as the Electors' Silver Republican candidate for the office of district judge of the Third Judicial district in a separate column, or if the court should be of the opinion that the electors had no right to use the name of the Silver Republican party that their nomination of the said Theodore Brantley be allowed to appear on the ballot as the Electors Independent nomination in a separate column for the office of district judge of the Third Judicial District."

We are of opinion that under no circumstances can the name of Theodore Brantley be permitted to appear as the Electors Silver Republican candidate, because we do not believe the electors are authorized to nominate Theodore Brantley as a Silver Republican candidate. Nor do we think his name should be permitted under the circumstances of this case to appear on the ballot as an Independent candidate. In determining this question we must consider the rights of the electors who signed the certificate of nomination of Theodore Brantley. It evidently was the intention, as appears from the allegations in the answer, of the electors who signed the certificate of nomination to nominate Theodore Brantley as a Silver Republican. It does not appear anywhere that the electors ever intended to nominate him as an Independent candidate. He is nominated and certified as the candidate of the Silver Republican party; we have no right to presume that the electors who signed this certificate of nomination would ever have done so if it had been proposed to them to nominate Theodore Brantley as an Independent candidate for judge of that district, and for this court now to change the nomination of Theodore Brantley from that of a candidate of the Silver Republican party to that of an Independent candidate for judge of said district, we think would be unauthorized by the law and by the action of the electors of that district, and might operate as a wrong, an injustice and a fraud upon the electors.

We are of opinion that the questions involved in this case

were practically determined in the case of *State ex rel. Woody v. Rotwitt, supra*.

It is therefore ordered that the writ of injunction issued in this case be made permanent.

Writ granted.

DE WITT and HUNT, JJ., concur.

STATE EX REL. MATTS, v. FISHER, CLERK AND RECORDER OF DEER LODGE COUNTY.

[Submitted October 21, 1896. Decided October 22, 1896.]

See syllabus and opinion in *State ex rel. Matts v. Reek, ante*, page 557.

ORIGINAL PROCEEDING. Petition for an injunction. Writ made permanent.

T. J. Walsh, for Relator.

McConnell & McConnell and *Henri J. Haskell*, Attorney General, for Respondent.

PER CURIAM.—The questions of both law and fact involved in this case, are identical with those determined by this court in *State ex rel. Matts v. W. J. Reek*, and upon the authority of that case, it is ordered that the writ of injunction issued in this case be made permanent.

STATE EX REL. SLIGH, v. REEK, COUNTY CLERK OF
GRANITE COUNTY.

[Submitted October 21, 1896. Decided October 22, 1896.]

ELECTIONS—Injunction—Dismissal for laches.—An application to this court for an injunction to restrain a county clerk from placing certain names upon the official ballot, which involves a contention between two rival conventions of a political party, each claiming to be the only regular convention of that party and nominating candidates for the same county offices, and each being composed of delegates as to whom there was a showing that they were elected from the body of the electors of the county, will be dismissed for laches where the application which might have been made ten days earlier, was delayed until a time which left only a few hours for the consideration of important questions presented.

ORIGINAL PROCEEDING. Petition for an injunction. Application dismissed.

McConnell & McConnell, for Relator.

J. W. Kinsley, for Respondent.

PER CURIAM.—This proceeding in its nature and object is similar to the many other election ballot cases which we have heard during this week. The relator seeks to restrain the county clerk from placing upon the official ballot certain names. The question raised here differs somewhat from that presented in any of the other cases. The contention between the relator and the person whom he seeks to have excluded from the official ballot is: this relator and his associates claim to be the nominees of the Silver Republican party of Granite county duly nominated by a regular convention of that party. The persons whose nominations he attacks make precisely the same claim, in other words, we have a contention between two rival conventions each naming candidates for the same county offices and each convention claiming to be the only regular convention of the Silver Republican party. It appears that each convention was in fact composed of delegates as to whom there is a showing that they were elected from the body of the electors of the county. This raises a question not

heretofore decided and one of very great importance. We are informed that the official ballot must be printed and advertised to-morrow. All business of this court has been set aside for the last week, and our whole attention has been occupied in the hearing of these election ballot cases. The certificate of nomination which this relator seeks to attack was filed on October 13th. The vitally important questions in the case have been allowed to rest until this time and now their consideration is thrust upon us when there is absolutely no time for a consideration which would enable us to arrive at any proper conclusion or one that would be satisfactory to ourselves or the electors. Just what may be the duty of the court as between rival conventions which make something of a showing (how satisfactory it may be we are not prepared to say) that they were representatives and composed of delegates coming from the electors, we are not able to determine in a few hours consideration. The subject is too important and too far reaching. By reason of laches and negligence of the relator in not presenting his case so that the court would have a reasonable time for its consideration, we shall dismiss the application and refuse in any way to interfere with the action of the county clerk. We do not consider that it is our duty to stop the proceedings of an election when the question is forced upon us at this late hour.

We reserve any expression of opinion as to the merits of the case.

STATE EX REL. STEVENS, v. REEK, COUNTY CLERK OF
GRANITE COUNTY.

[Submitted October 21, 1896. Decided October 22, 1896.]

See syllabus and opinion in *State ex rel. Stigh v. Reek*, ante, page 561.

ORIGINAL PROCEEDING. Petition for injunction. Application dismissed.

McConnell & McConnell, for Relator.

J. W. Kinsley, for Respondent.

PER CURIAM.—For the reasons set forth the state of Montana at the relation of Sligh against Reek, just decided, we shall decline to consider this case and we shall dismiss the application.

This case is even in a worse condition as to laches and negligence than the Sligh case. The application was made only last night and made then after office hours. It involves some of the questions, if not all of them, which are contained in the Sligh case.

We also here reserve any opinion as to the merits and dismiss it for the reasons stated.

LARGEY, APPELLANT, v. CHAPMAN ET AL., RESPONDENTS.

[Submitted October 5, 1896. Decided November 9, 1896.]

ATTACHMENT—Waiver of security—Mortgage.—A surety on a promissory note whose liability has been secured by a chattel mortgage cannot, upon being obliged to pay the note, waive the mortgage security and proceed by attachment against his principals to recover the debt, but must foreclose the mortgage as required by section 358 of the Code of Civil Procedure (1887) relating to the foreclosure of mortgages and providing that "there shall be but one action for the recovery of any debt, or the enforcement of any rights, secured by mortgage upon real or personal property, which action shall be in accordance with the provisions of this chapter." (*Parberry v. Woodson Sheep Co.*, ante, 317, distinguished.) But this decision does not affect the question of enforcing the debt by exercising a power of sale contained in the mortgage. (*First National Bank v. Bell S. & C. M. Co.*, 8 Mont. 32, cited.)

SAME—Affidavit—Mortgage security.—The plaintiff in attachment being required to make an affidavit stating that the debt is not secured by a mortgage, lien or pledge upon real or personal property, or, if so secured, that the same has become insufficient by the act of the defendant or by any means has become nugatory, a judgment on the pleadings for the defendant in an attachment suit is proper where the answer alleged that the indebtedness was secured by a chattel mortgage which had never been foreclosed, and there was no averment in reply that the security had become nugatory or that it had become insufficient by the acts of the defendants.

STATUTES—Construction.—In adopting the statute of another state we adopt the construction placed upon it by the courts of that state. (*First National Bank v. Bell S. & C. M. Co.*, 8 Mont. 32; *Stackpole v. Hallahan*, 16 Mont. 40; *Murray v. Hetzke*, 17 Mont. 353; *State v. O'Brien*, ante, 1; *State ex rel. Masted v. Butte City Water Co.*, ante, 199, cited.)

JUDGMENT ON PLEADINGS—Motion to dismiss.—The granting of a motion to dismiss an action after the filing of a complaint, answer and replication has the effect of a judgment on the pleadings.

Appeal from Second Judicial District, Silver Bow County.

18	563
18	597
18	563
20	563
18	563
22	203
18	563
26	200
18	563
28	86
18	563
32	473
18	503
30	422

ACTION to recover money paid by plaintiff as surety for defendants. Judgment on the pleadings was rendered for the defendants below by McHATTON, J. Affirmed.

John W. Cotter and F. T. McBride, for appellant.

Charles R. Leonard and John T. Baldwin, for Respondent.

DE WITT, J.—After the filing of the complaint, answer and replication the defendants moved to dismiss the action. This motion was granted and judgment entered in favor of defendants. This action of the court was in effect giving judgment upon the pleadings.

The action was commenced against the defendants John Astle and J. W. Chapman. The complaint stated that plaintiff had signed two notes with the defendants and that he, plaintiff, was in fact only surety for the defendants, and as such has been obliged to pay the notes. He sought in this action to recover the money so paid.

Without reciting the pleadings at any length, we are satisfied to say that defendant Astle's answer sufficiently set forth that the indebtedness of defendants to plaintiff was secured by a chattel mortgage which had never been foreclosed. This is not denied. Plaintiff's contention is that, notwithstanding the debt was secured by a chattel mortgage, he could bring the present action upon the debt and procure an attachment against the property of defendant Astle, as he did, without bringing any action to foreclose the chattel mortgage. Respondent relies upon the provisions of Section 358, Code of Civil Procedure, 1887, which provides as follows:

“There shall be but one action for the recovery of any debt, or the enforcement of any rights, secured by mortgage upon real estate or personal property, which action shall be in accordance with the provisions of this chapter.”

The chapter, to-wit: Chapter 1, title X, in which this section is found relates solely to actions for foreclosure of mortgages. Respondent contends that under these provisions the

plaintiff could not sue or attach without bringing an action to foreclose. The district court adopted this view, and in this, we think, was correct.

We are of opinion that the plaintiff cannot by simply suing on the debt and attaching the property, and in the course of such proceedings making an affidavit that his debt is not secured by mortgage, lien or pledge upon real or personal property, thus waive the mortgage and consider it as naught. Our statute is the same as that of California and was evidently taken from that state. The supreme court of California in *Barbieri v. Ramelli*, 84 Cal. 154, says:

“It is contended here on the part of the defendants (appellants) that the action cannot be maintained, for the reason that it is prohibited by section 726 of the Code of Civil Procedure. That section, so far as it bears on this case, reads as follows: ‘There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real estate or personal property.’”

We are of opinion that the point is well taken. The statute is imperative. The word “secured,” in the section, does not mean that the security shall be adequate, or that in case prior liens upon it would exhaust the money derived from the land conveyed as security on a sale of it, that then the plaintiff is relieved from bringing the action to foreclose. The proper construction of the language of the statute is, that if the mortgage on its face purports to be a security to the plaintiff, then he must bring his action for foreclosure. This word has reference only to the purport of the mortgage as it appears on its face. The interpretation of it is not proper when its meaning is sought in something outside of the mortgage instrument. The plaintiff is not authorized to waive the security and bring an action on the indebtedness, and the court erred in so holding, as it did in effect, and rendering judgment for plaintiff.” (See, also, *Biddell v. Brizzolari*, 64 Cal. 362; *Porter v. Muller*, 65 Cal. 512; *Brown v. Willis*, 67 Cal. 236; *Porter v. Brooks*, 35 Cal. 199.)

The plaintiff relies for his right to waive the mortgage upon

several cases which he cites in his brief. We have examined these cases, and we find that they are decided without regard to a statute such as ours and that of California. In the states whence plaintiff's cases come, it is not provided directly by statute that there shall be but one action for the recovery of a debt secured by mortgage, which action shall be by foreclosure of the mortgage. We notice, however, in his list of cases, that of *Ould v. Stoddart*, 54 Cal. 613. But the facts in that case were exceptional and do not disturb the doctrines held by the California court in the other cases. In that case the mortgagee had gone to the state of Ohio and sued upon the debt and obtained a judgment. The court held that he could not afterwards maintain an action for foreclosure in the state of California. There is in the case language in support of the view of the plaintiff in this case. But even then the later cases in 64, 65, 67 and 84 Cal., which we have cited, sustain the ruling of the court below in the case at bar.

We find the following in Shinn on Attachment, Section 24:

"The policy of the law, in most states, is that a creditor holding a security by way of 'mortgage, lien or pledge upon real or personal property' shall not resort to the summary process of attachment until he has exhausted his security, consequently if a creditor have such lien for his demand he can not have attachment."

On the other hand we find the following remarks in Drake on Attachment, section 35:

"The right of a creditor to sue his debtor by attachment is not impaired by his holding collateral security for the debt. The supreme court of Massachusetts once held that a creditor who had received personal property in pledge for the payment of a debt could not attach other property for that debt, without first returning the pledge; but this position was afterwards repeatedly overruled by that court. And a mortgagee of personal property may waive his right under the mortgage, and attach the mortgaged property to satisfy the mortgage debt, even after he has taken possession of it under the mortgage."

Again, in Shinn on Attachment, section 28, we have these remarks :

“There is such contrariety in the laws of the different states relating to the attachment of personal property on which some third party holds a lien, that it is difficult to lay down any rule that will be universal. Generally, chattels subject to a lien cannot, unless by virtue of a special statute, be attached. But this is for the protection of the party having the lien, and if he waive his objection to the attachment, it does not lie in the mouth of the general owner to complain. Such an attachment is not void, but only voidable at the election of the possessor of the lien.”

But we are of opinion that the case depends upon the statute. The statute was clearly construed in 84 Cal. above cited, and there seems to be no reason in this case to depart from the rule, that in adopting the statute we have adopted the construction. (*First National Bank v. Bell S. & C. M. Co.*, 8 Mont. 32; *Stackpole v. Hallahan*, 16 Mont. 40; *Murray v. Heinze*, 17 Mont. 353; *State v. O'Brien*, 18 Mont. 1; *State ex rel. Milsted v. Butte City Water Co.*, 18 Mont. 199.)

Again, it is to be observed that the case before us is distinguished from *Parberry v. Woodson Sheep Co.*, 18 Mont. 317, which plaintiff cites in favor of his contention. In that case the court found that the debt was not secured by mortgage, lien or pledge upon real or personal property at the time of the commencement of the action. We held that this finding of the court was supported by the evidence. It appeared by that evidence that whatever pledge, (if any,) had been given to secure the debt had been returned to the pledgor and accepted by him. Thus the pledge was terminated, if it ever existed, by the express acts and agreements of the parties.

Whatever we here hold in reference to a debt secured by mortgage being enforced by foreclosure of the mortgage does not in any way affect the question of the enforcing the debt by exercising a power of sale contained in the mortgage. (*First National Bank v. Bell S. & C. M. Co.*, *supra*, same case 156 U. S. 470.)

Before the decision of the motion to dismiss the case was made the plaintiff himself moved to dismiss as to Chapman,

and to pursue the action against Astle alone. This motion was denied. We do not think that the plaintiff in this case was in any way prejudiced, for even if he had dismissed as to Chapman, the fact still remained that the debt which he then sought to enforce against Astle alone was secured by at least one chattel mortgage. Our attachment law provides that before the writ is issued, the plaintiff shall make an affidavit stating, among other things, that the debt is not secured by a mortgage, lien or pledge upon real or personal property or, if so secured, that the same has become insufficient by the act of the defendants, or by any means has become nugatory. Therefore, if a mortgage, lien or pledge had existed the attachment could not be had, unless the same had become insufficient by the act of the defendants, or by any means had become nugatory. Neither in the original replication, nor in the second one which was offered and which the court did not allow to be filed, did the plaintiff allege either that the security had become nugatory, or that it had become insufficient by the acts of the defendants.

We are of opinion that the order of the court dismissing the case, and the judgment entered in consequence of that order are correct.

The judgment will, therefore, be affirmed.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

CHICAGO TITLE & TRUST COMPANY, AS RECEIVER,
RESPONDENT, (BROWN BROS. & COMPANY ET
AL., INTERVENORS AND APPELLANTS,) v.
O'MARR ET AL., APPELLANTS.

[Submitted September 28, 1896. Decided November 9, 1896.]

CHattel Mortgage—Statutes—Repeal—Vested rights.—Section 5182 of the Political Code providing that the repeal of the old statutes should not "abridge, abolish or impair any vested right, nor should such repeal change the force and effect of any act done or judgment rendered," preserved rights founded upon past transactions, and

18	568
24	100
18	568
25	243

therefore the chattel mortgage law of the code of 1896 could not affect chattel mortgages given prior to its adoption so as to exchange their priorities as fixed by the former law.

SAME—Delivery of possession—Priority.—Where one holding a first mortgage upon a stock of merchandise enters into possession of the stock and conducts the business through an agent and thereafter the mortgagor executes other mortgages upon the same stock, and the agent for the senior mortgagee consents to act and does act as agent for the junior mortgagees also, the possession of the agent then becomes the joint possession of all the mortgagees, in which case the purchase of the senior mortgage by one holding the last mortgage, with knowledge that the agent was holding under all the preceding mortgages, and the substitution of his own agent, to whom possession was surrendered, does not operate to subordinate the intermediate mortgages to the lien of the last mortgage.

SAME—Defective affidavit—Possession by mortgagee.—The invalidity of a chattel mortgage as against third parties, arising from a defective affidavit, is cured by the mortgagee taking actual possession of the mortgaged goods before the acquisition of rights by such third parties. (*Leopold v. Silverman*, 7 Mont. 266, cited; *Marcum v. Coleman*, 10 Mont. 78; *Milburn Manufacturing Co. v. Johnson*, 9 Mont. 542, distinguished.)

SAME—Description—Sufficiency.—A description of mortgaged property as "the freightling outfit of B. F. & P. consisting of sixteen head of horses, all freight wagons and harness, being same property described in mortgage given to First National Bank of Nelhart, Montana, and bearing same description. This mortgage subject to the mortgage of First National Bank aforesaid for \$1,500; kept in Nelhart and on road freighting; more particularly described as follows."—is sufficient not only as between the parties to the mortgage but as to third parties as well, without a more specific description being added after the words "as follows."

SAME—Adding particular description after execution.—The insertion in a chattel mortgage of a more particular description of the property, made by the mortgagee's attorney after the mortgage had been executed and acknowledged by the mortgagors, but with their express consent, does not render the mortgage void as against third parties where no rights intervened, and the description as given at the time of execution of the mortgage was sufficient without further particularization.

SAME—Attachment by mortgagee—Effect on mortgage lien.—A creditor whose debt is secured by a mortgage has no right to proceed against his debtor's property by attachment until his mortgage security has been exhausted by foreclosure, but the fact that an attachment is issued under such circumstances does not operate as a waiver of the mortgage lien in the absence of facts creating an estoppel. (*Largay v. Chapman*, ante, page 563, cited.)

SAME—Attachment and sale under execution by mortgagee—Conversion.—Where a creditor holding a chattel mortgage upon a stock of merchandise, upon which there is a prior mortgage and also several mortgages subsequent to his, deposits the amount of the prior mortgage with the county treasurer as permitted by statute, and, disregarding the subsequent mortgages which were valid liens, attaches the property and sells it under execution, he and the sheriff are trespassers and liable to the subsequent mortgagees for the value of the property so converted in excess of the amount of his own mortgage.

REHEARING—Conversion—Value of property.—A motion for rehearing in such case made upon the ground that the value of the property sold under the defendant's execution was stipulated on the trial to be \$12,500, and for that reason a new trial for the purpose of determining the value of the property converted was unnecessary, will be denied where it appeared from the record that the court struck out the defendant's allegations raising an issue as to the value, rendering proof upon that point immaterial, and it seemed that the stipulation was made for the purpose of the trial as the court viewed the issues to be tried.

Appeal from Ninth Judicial District, Meagher County.

ACTION for conversion. The cause was tried before HENRY,

J., without a jury. Judgment was rendered for the plaintiff below. Reversed.

Statement of the case by the justice delivering the opinion.

This action grows out of the alleged conversion by the defendants of chattels mortgaged to the plaintiff and the intervenors. Burchard & Pierse, merchants at Neihart, becoming involved, on July 3d 1893, executed a chattel mortgage to one Atkinson to secure a note for \$4,100. Atkinson took instant possession under the mortgage, placing one Harrison in charge as his agent. On July 12th, thereafter, the firm executed and delivered their chattel mortgages to other creditors in the following order, and to secure the following sums, to-wit: Defendant Finch, Van Slyke, Young & Co., \$1,970; Lindeke, Werner & Schurmeier, \$145.14; Foot, Schultz & Co., \$485; McKibbin & Co., \$412.41; Brown Bros., \$1,684.50. These mortgages were filed on July 12th, 1893. The affidavits to these latter mortgages were made by Harrison, as agent for the mortgagees but are admitted not to be in proper form. Thereafter on July 12th, 1893, Burchard & Pierse gave another mortgage on the same property already mortgaged and certain other property, to plaintiff to secure eight notes for \$4,292.23, which mortgage was verified and filed for record on July 13th, 1893. This mortgage also provided that the mortgagee might remain in possession, and contained a clause making it subordinate to the mortgages heretofore referred to, or any of them, provided "in case they, or any of them, were duly executed, dated and recorded prior to the date, execution and recording" of the mortgage to plaintiff. On July 31st, thereafter, the Atkinson mortgage was transferred and assigned to plaintiff and Atkinson gave to plaintiff an order requiring Harrison, his agent, to surrender possession to plaintiff's attorney. Under this order plaintiff placed one Beech in charge of the stock.

On August 5th, thereafter, the defendants Finch, Van Slyke, Young & Co. brought an action against Burchard & Pierse for the amount of their debt, procured a writ of attach-

ment, seized all of the mortgaged property and thereafter sold the same under execution for the sum of \$5,372.75. On August 28th, Finch, Van Slyke, Young & Co. deposited with the county treasurer the sum of \$3,100, to pay off the balance due on the Atkinson mortgage, which sum was afterwards received by the plaintiff on said account.

On August 14th, the plaintiff brought this suit against Finch, Van Slyke, Young & Co. and the sheriff to recover the amount due on the Atkinson mortgage and also the amount due on its own. The other creditors intervened and claimed a joint possession with plaintiff through Harrison, agent, and a joint right to share in the recovery. After this suit was begun plaintiff took the \$3,100 on deposit, as the balance due on the Atkinson mortgage. The intervenors in their complaint asked that plaintiff recover judgment against defendants for the balance due upon the first note and mortgage after the credit of \$3,100, and for judgment against defendants for the amounts due on their notes and mortgages at the time of the conversion, and that the plaintiff take nothing until after the payment of said amounts due intervenors.

The cause was tried to the court and judgment rendered in favor of plaintiff and against the defendants in the sum of \$4,910.67, the amount asked by plaintiff under its second mortgage, and that the intervenors take nothing as against plaintiff and that the intervenors take nothing as against defendants.

Defendants appeal from the judgment against them in favor of plaintiff and from the order of the lower court overruling the defendants' motion for a new trial.

The intervenors appeal from the judgment against them and in favor of defendants and from the judgment against them and in favor of plaintiff.

On the trial R. W. Berry, a witness for plaintiff, testified substantially as follows: In July and August, 1893, I was agent and attorney of plaintiff and as such went to Neihart to get security on a stock of goods from Burchard & Pierse. The result of my visit was that I secured on July 12th, 1893,

a chattel mortgage of that date; I had an arrangement with them concerning the delivery of this mortgage; I accepted it for plaintiff conditionally, that is, with a writing wherein it was agreed between Burchard & Pierse and myself, as attorney for plaintiff, that the chattel mortgage given by Burchard & Pierse to the plaintiff should be considered absolute at the option of myself, as agent, on the advice of said plaintiff. (The mortgage was to be absolute unless surrendered by Berry in exercise of the option.) I found that Burchard & Pierse had given a chattel mortgage to F. P. Atkinson, of Great Falls, for \$4,100, and had also placed an agent, Harrison, in charge. They claimed also that they had given other mortgages aggregating about \$4,000 to various parties, Finch, Van Slyke, Young & Co., Brown Bros. and others mentioned in the original mortgage. I asked them if they had copies. They said "No." After some further conversation they agreed to give a mortgage to secure this claim of \$3,148 and \$1,143, provided plaintiff would accept this mortgage as subject to the previous ones. I objected. They would make no other arrangement and I finally agreed to accept the mortgages, and that we would insert a clause providing "we would come in subject to those mortgages, or all of them, in case they were properly made out, executed, dated and recorded prior to ours, or in case any one of said mortgages was properly made out, why, we would come in subject to that; but we wanted to reserve our right to contest those mortgages if we saw fit." Burchard & Pierse said the mortgages were all right so far as they knew. I told them, not being able to see the mortgages, I simply wanted to reserve rights. Burchard demurred and I told him: "In case those other mortgages are all right we come in subject to them, * * * and in case they are not, we simply reserve our legal right. * * * If we can get in ahead of all of them, we want to do that, and if not, and if we can get in before a part of them, then that is all right." It was under those conditions that this provision was included. After this talk I drew up the mortgage conditionally, as said. Meantime I

told them we ought to have additional security, as in case these mortgages were good we would come in at the tail end of about \$8,000; and they objected, but finally said they owned a two-thirds interest in a freighting outfit, mortgaged to the First National Bank. Pierse, for the firm, agreed to include that property in this mortgage. Having no description of the property, the mortgagors told me that I could put this property in the mortgage as the same property described as mortgaged to the First National Bank, "with the privilege that I could consult the First National Bank mortgage and then add a specific description of that property to the mortgage." The mortgage had been written down to the words "bearing same description" while in Neihart. When I got to White Sulphur Springs the description was added, beginning with the words "more particularly described as follows:" The clause that the mortgage was subject to the First National Bank mortgage was originally put in the mortgage at Neihart. The latter one of the two affidavits to this mortgage was added after I reached White Sulphur Springs, which was on the evening of the 13th of July—that is one day after the date of the execution of the mortgage by the mortgagors. (The affidavit referred to by the witness is his own, to the effect that he was the attorney of the Chicago Title & Trust Co., the mortgagee; that plaintiff was absent from Meagher county at the time of the execution and delivery of the mortgage and that the mortgage was made in good faith, to secure the amount named therein, and without any design to hinder or delay the creditors of the mortgagors, or either of them.) I advised plaintiff to take up the Atkinson mortgage and take possession under both mortgages. They sent me \$4,100, which I turned over to Atkinson and had the Atkinson mortgage assigned to us. I then took Mr. Beech to Neihart, and Harrison, the agent of Atkinson, turned the stock over to me. This was on or about July 30th, 1893. Beech acted as plaintiff's agent. After Beech had possession about a week, Finch, Van Slyke & Co. attached.

On cross-examination he said that he had said nothing to

Burchard & Pierse about verifying the mortgage, and that after the insertion of the description of the freighting outfit neither of said mortgagors ever did verify. Witness further said that when he went to Neihart, Harrison was in possession of the property under the Atkinson mortgage. Harrison had a sign on the building as agent. This was taken down after the witness went to Neihart and the sign of O. E. Beech was substituted. When the attachment was made, witness demanded possession upon Harrison. Witness also said that when he made demand on the sheriff, he notified him that he claimed under both mortgages—the Atkinson and the Trust Company mortgage—and that when he took possession he was acting solely for the Chicago Title & Trust Company.

W. H. Harrison testified for plaintiff. He said that he was in charge of the Burchard & Pierse stock from July 3d until about July 31st., when he turned it over to Mr. Berry; that between the 13th and 31st of July there was something over \$600 worth of goods sold; thereafter the Atkinson order was produced and witness turned everything over to Berry and walked away.

E. A. Young, of the firm of Finch, Van Slyke, Young & Co., testified that on August 7th, 1893, he was in Neihart and that Mr. Beech, who claimed then to be in possession of the stock formerly owned by Burchard & Pierse, told him that he was in possession under the mortgage given to Atkinson for about \$4,000, and that he had paid off about \$1,000 of this mortgage from the sales of merchandise; witness also said that Beech had the keys and delivered them up at the time the officer made the attachment.

On cross-examination witness said that Beech told him he was in possession under the Atkinson mortgage for the reason that he understood that all the balance of the mortgages were void and of no account; that he understood from Atkinson that about \$1,000 of the proceeds of sales had been turned over on the Atkinson mortgage; that he knew from some source that the Trust Company had purchased the Atkinson mortgage.

Max Waterman, Esq., testified that as counsel for Finch,

Van Slyke, Young & Co., he went to Neihart at the time of the attachment by that firm; that Beech then said that he was in possession as the agent of Atkinson, and that the Trust Company had purchased the Atkinson mortgage and gone into possession under that mortgage; that something was said about a number of mortgages being void and that as soon as witness found that Beech did not claim to be in possession except under the Atkinson mortgage, then witness advised Finch, Van Slyke, Young & Co. to attach.

Richard Bennett, in behalf of the intervenors, testified that he drew all the mortgages made by Burchard & Pierse dated July 12th, 1893, to the intervenors in this suit, and that Berry took possession of the Burchard & Pierse stock about July 31, 1893.

W. H. Harrison was recalled in behalf of the intervenors and stated that he was in possession of this property under the Atkinson mortgage, but that he acted as agent, subordinate to the Atkinson mortgage, for Lindeke, Warner & Schurmeier; Finch, Van Slyke, Young & Co.; Brown Bros.; Wyman & Partridge Co. and McKibbin & Co.—in fact for all the mortgages executed about the date of the intervenors' mortgages; that Atkinson permitted him to act as agent for these parties upon the condition that their mortgages were to be subordinate to his. Witness further said that the attorney for the intervenors wanted him to act as agent for these mortgagees but he declined until Atkinson consented, provided his mortgage was recognized first, and that when he yielded possession to Berry he did so believing his duty was to do what Atkinson told him to do, and in acting for other creditors he acted for them pursuant to the instructions given by Atkinson.

Smith & Gormley and *Richard Bennett*, for Intervenor and Appellants.

I. Plaintiff's mortgage, taken on July 12, after all of intervenors' mortgages had been given, was by its terms, subject to intervenors' mortgages, for intervenors' mortgages were "executed and dated" prior to the date and execution

of plaintiff's mortgage and were filed for record prior to the filing of plaintiff's mortgage. By the terms of said mortgage it was subject to intervenors' mortgages even though intervenors were not in the possession of the mortgaged property, and hence, when plaintiff took possession under its mortgage on July 31, it must have taken possession for the mortgagees recognized in its mortgage as well as for itself. Plaintiff's possession must have been intervenors' possession also, and the record of plaintiff's mortgage in the clerk and recorder's office, containing the clause referred to, and the taking possession of the mortgaged property by the plaintiff, were notice to the defendants as the character of that possession. (2 Cobbey on Chattel Mortgages, § 1039; *Flory v. Comstock*, 28 N. W. 703; *Brown v. O'Neal*, 30 Pac. 539; *Freeman on Cotenancy*, § 167.) Furthermore, intervenors, through their agent, Harrison, were in possession under their mortgages at the time of the execution of plaintiff's mortgage. Intervenors' mortgages were, therefore, at that time good as against all the world without affidavit, acknowledgment and filing for record, and under the clause in plaintiff's mortgage referred to the intervenors' mortgages would continue to hold priority over plaintiff's mortgage. Any act done by plaintiff in protecting its mortgage would likewise protect intervenors' mortgages. The changing of agents by plaintiff, in substituting Beech for Harrison, could not deprive intervenors of their possession.

II. Though accompanied by defective affidavits, intervenors' said mortgages were duly executed, dated, and filed for record prior to plaintiff's mortgage, and hence plaintiff took its mortgage subject to intervenors' mortgages. The clause inserted in the mortgage making it subject to intervenors' mortgages shows such to be the plain intention of the mortgagors and similar clauses in intervenors' mortgages show that the mortgagors intended that all the mortgages given by them should come in a certain stated order as to priority. The mortgagors themselves could not afterwards question the relative priority so expressly declared by them, and neither could

any of the mortgagees question the validity of the prior mortgages recited in their own. (*Perrine v. First National Bank of Jamesburg*, 27 Atl. 640; *Clapp v. Halliday*, 2 S. W. 853; *Flory v. Comstock*, 28 N. W. 703; 2 Cobbey on Chattel Mortgages, § 1039; Jones on Chattel Mortgages, § 494.)

H. G. & S. H. McIntire, for Respondent.

I. Defendants in order to sue out their attachment had to file an affidavit containing *inter alia* a clause that their debt was not secured by mortgage, pledge or lien. By this act they waived any rights they may have had by reason of said mortgage and are estopped from claiming under it in any way. (Jones on Chattel Mortgages, § 565; 2 Cobbey on Chattel Mortgages, § 746; *Evans v. Warren*, 122 Mass. 303; *Dyckman v. Sevatson*, 39 N. W. 73; Bigelow on Estoppel (3d Ed.) 562, 600, 603; 1 Herman on Estoppel, §§ 13, 14; *Choquette v. Ortiz*, 60 Cal. 600; *Dyckman v. Sevatson*, 39 N. W. 73.)

II. The chattel mortgage law as it stood at the time plaintiff's rights became vested must control. This is the language of the code. (Political Code § 5182, subd. 1.)

III. The clause in plaintiff's mortgage that defendants and intervenors are seeking to take advantage of is "in case they (the mortgages mentioned) or any of them were duly executed, dated and recorded before that time." Except the Atkinson mortgage none of said mortgages come within that provision; they were not duly executed, in that they lacked the statutory affidavit of good faith. The word executed as there used means a compliance with the statutory provisions concerning chattel mortgages. As against others than the parties thereto a chattel mortgage is of no avail unless the statute is complied with. It is not executed unless the statute is followed. (1 Cobbey on Chattel Mortgages, § 391; *Butte Hardware Co. v. Sullivan*, 7 Mont. 307, and the other Montana chattel mortgage cases.)

IV. The alteration complained of is but an amplification of a description previously contained. It added nothing to the instrument nor was the effect of the instrument changed

in any respect. Nor was the alteration a material one. (*First National Bank v. Wolff*, 21 Pac. 551; *Fisherdict v. Hutton*, 62 N. W. 488; *Churchill v. Bielestein*, 29 S. W. 392; *Murray v. Klinzing*, 29 Atl. 244.) Nor had it been made subsequent to the delivery of the instrument. The testimony shows that this instrument was not to be deemed delivered except at the option of the mortgagee. This option was not exercised until immediately prior to the filing of the mortgage with the county clerk, hence the delivery did not take place until then. But the discussion is idle in view of the fact that the alteration, if it be one, was expressly consented to.

V. As to intervenor's appeal from plaintiff's judgment. We have nothing to do with them. Before they can maintain a suit against us they must first show that we have done them some wrong. This, however, they have failed to do. Possibly if they had been in possession of these goods with ourselves they might maintain an action against the common wrong-doer, but not against us. It is a strange position to seek to deprive us of our property because somebody else deprived them of theirs. That they were not in conjoint possession of these goods and had no right to the same is shown by the evidence, and by the argument of defendants. That their mortgage was not superior to ours by reason of their construction of the clause they depend upon is sufficiently shown in a former part of this brief.

HUNT, J.—Inasmuch as the inception of any rights which may have accrued to the respective parties to this suit and the judgment rendered therein antedate the adoption of the codes of 1895, the law as it stood at the time such rights became fixed must control. The statute, section 5182, of the Political Code, 1895, expressly provides, among other things, that the repeal of the old statutes should not abridge, abolish or impair any vested right or rights accruing or accrued; nor should such repeal change the force and effect of any act done or judgment rendered, or suit or proceeding had or commenced under the law as it stood prior to the taking effect of

the codes and repeal clauses thereof, but all such rights and liabilities may be enforced and the proceedings continued conforming the same, as far as practicable, to the provisions and remedies prescribed by the new codes, etc. This section preserved rights founded upon past transactions. The judgment herein determined the rights of the parties before the court as the law stood at those times. To now consider the new mortgage law as applicable and to award one mortgage a priority over another, not awarded by the statute in force when the transactions were had and the judgment was rendered, would, by postponing the right to enforce certain liens as prior to others, materially lessen the value of the security for the payment of certain of the debts and thus change the force and effect of the judgment already rendered, and so directly conflict with the letter of the provisions of the new codes.

We, therefore, dismiss defendants' contention that the new codes affect the mortgages involved in this suit, so as to exchange their priorities as the old law may have fixed them, and we shall consider the case with relation to the code of 1887.

The case may be simplified by first deciding whether defendants and intervenors had mortgages, or liens or pledges upon the personal property of Burchard & Pierse, and if they did what were their relations between themselves and plaintiff. The first mortgage to Atkinson is admitted to be valid in all respects. It is also conceded that Atkinson had possession of the property under this mortgage, such possession being through his agent Harrison. But Harrison had hardly entered upon possession when the mortgagors to secure other indebtedness, executed subsequent mortgages to Finch, Van Slyke, Young & Co., defendants, and to the several intervenors. These several mortgages were all executed by Harrison, who consented to act, and did act, as the agent of the defendant, Finch, Van Slyke, Young & Co., and intervenors, with the express consent of Atkinson, the mortgagee in the first (Atkinson) mort-

gage. Harrison verified the affidavit of good faith as the agent of the mortgagees named in the mortgages, and we think under the evidence held possession as much for their benefit as for Atkinson. It is true that the affidavits to these mortgages given to defendants and intervenors were defective; but the mortgages, under section 1538 of the Fifth Division General Laws, code 1887, were none the less valid between the parties to them, while as against third parties delivery of possession and taking actual possession under the mortgages before the acquisition of rights by such third parties, cured the invalidity of the instruments arising from their insufficient verification. (Jones on Chattel Mortgages, § 178; *Chapman v. Sargent* (Col.) 40 Pac. 849; Cobbey on Chattel Mortgages, § 498.) This doctrine is well sustained by authorities, and is thus stated in *Petring v. Chrisler*, 90 Mo. 649:

“Where the mortgagee, in good faith, takes actual possession of the goods prior to the levy of the attachment, for the purpose of securing the payment of his debt and continues to hold the actual possession up to the time of the levy, he will be protected, and will, in that event, hold the goods as against the subsequent attaching creditor, and that, under this state of facts, it is immaterial that the mortgage contains stipulations which render it void, except as between the parties.”

In *Leopold v. Silverman*, 7 Mont. 266, a chattel mortgage was held void as to third persons because of the omission in the mortgage and the affidavit thereto, to show the interest of a certain firm in an indebtedness to secure which the mortgage was given. But the court said, that: “If the mortgagees were really in undisputed possession of the goods mortgaged, no affidavit would be necessary at all, and the defects so apparent in the affidavit would become immaterial.”

This undisputed actual possession of Harrison, was therefore, until July 31st, at least the joint and valid possession of all the mortgagees (other than plaintiff), including the possession of defendants Finch, Van Slyke, Young & Co., who held the first mortgage after the undisputed one to Atkinson.

But right here another mortgage is to be considered with

its attendant facts. Directly after the mortgages to intervenors had been given, and while Harrison was in possession as above stated, to-wit: July 12th, 1893, the failing debtors gave still another mortgage—to the plaintiff in this suit. This mortgage included the same property which had theretofore been mortgaged, namely: the stock of goods and book accounts, etc., of Burchard & Pierse and certain other property, which at the time of the execution of the mortgages, by the mortgagors, was described as follows: “The freight outfit of Burchard, Fowler & Pierse, consisting of sixteen head of horses, all freight wagons and harness, being same property described in mortgage given to First National Bank of Neihart, Montana, and bearing same description. This mortgage subject to mortgage of First National Bank aforesaid for \$1,500; kept in Neihart and on road freighting; more particularly described as follows:” The mortgage authorized the mortgagees, or their attorney, to remain in possession of the property mortgaged, and also contained the following clause: “This mortgage is given subject to the following mortgages in case said mortgages or any of them are duly executed, dated and recorded prior to the date, execution and recording hereof, to-wit: F. P. Atkinson, \$4,100; Finch, Van Slyke, Young & Co., \$1,917; Lindeke, Warner & Schurmeier, \$154.14; Foot, Schultz & Co., \$485; M. McKibbin & Co., \$412.41; Brown Bros., \$1,684.50.”

It appears that when this mortgage was executed and verified by the mortgagors, not having at hand a more detailed description of the “freighting outfit,” the attorney of the mortgagees was given authority by the mortgagors to consider the mortgage absolute at his option and to consult a mortgage on record at the county seat some forty miles away, for the purpose of securing a further description of said outfit, and when so secured to add to the description already given the more specific designation of such freighting outfit. The next day the attorney for the mortgagees attached to the mortgage an amplified description of the wagons and animals constituting said outfit, and thereafter, without the presence of

the mortgagors, the attorney verified the affidavit of good faith in behalf of his clients and then filed the instrument with the county clerk.

We shall treat this mortgage as valid, disregarding the appellants' contention that the description of the freighting outfit, which plaintiff's counsel added to the description already in the mortgage, "constituted a material change in the instrument after execution, acknowledgment, verification and delivery and thus rendered it void and of no effect." The mortgage contained a sufficient description of the freighting outfit before the more specific description was added. There was a complete means of identifying the property by reference to it and such inquiries as the instrument itself suggested. The property was described as "the freighting outfit of Burchard, Fowler & Pierse consisting of sixteen head of horses, all freight wagons and harness, being same property described in mortgage given to First National Bank of Neihart, Montana, and bearing same description. This mortgage subject to the mortgage of First National Bank aforesaid for \$1,500, kept in Neihart and on road freighting, more particularly described as follows:" This was sufficient not only between the parties, but as to others who had in good faith acquired rights against the property. (Jones on Chattel Mortgages, § 53, *et seq.*)

But assuming the law did demand a more elaborate description of the property, it would seem under the circumstances of the case that the mortgage was still not void as to defendant. The agreement between the parties was that the mortgagees' attorney could consult the bank mortgage and then insert the description which he did insert, and furthermore, that the mortgage should be considered absolute at the option of the mortgagees' counsel. No rights intervened between the time that plaintiff received the mortgage at Neihart and added the description, and verified and filed the mortgage at White Sulphur Springs. The added description was not the inclusion of property not already included, nor was it an alteration of the contract between the parties; nor was it a fraud in

fact. It amounted to the elaborated expression of the already expressed intent of the parties, made in conformity with their positive authorization and before the instrument was finally delivered. Under these circumstances the mortgage should not be regarded as void. (*Fisherdict v. Hutton*, 62 N. W. 488.)

Upon another ground it would seem this mortgage must be held valid as against the defendant. If we still assume it was defectively executed, we nevertheless find a possession in plaintiffs under it before defendants made their levy of attachment. This proposition has heretofore been discussed and need not be dwelled upon. The fact of possession by the mortgagees before the attachment of defendants was levied distinguishes the case from *Marcum v. Coleman*, 10 Mont. 78, and *M. M. Co. v. Johnson*, 9 Mont. 542, cited by the appellant defendant. Appellant makes a point of the fact that taking possession was delayed until some nineteen days after the filing of the mortgage; but if the mortgage was good between the parties, in the absence of fraud and of any intervening rights accruing before possession was taken, why should it be held void on this ground?

We, therefore, have this resume of affairs: Up to July 31, Atkinson, Finch, Van Slyke, Young & Co., defendants, and the intervenors were all in actual, valid possession of the property, with Harrison as their agent. Harrison stood in a capacity not unlike that of an assignee of an insolvent debtor with preferred creditors under an assignment. The mortgagors were not in possession, and his duty was to watch the property and duly apply it to the payment of the debts due by Burchard & Pierse in the order of the mortgage liens filed, and pay over the surplus, if any, to the mortgagors. Now, while he was so executing his trust and still held possession, the mortgagors executed the mortgage to the Trust Company. This brings us to consider another point in this last mentioned mortgage with its effect upon the various phases of the case. It was given subject to Atkinson's, defendants' and intervenors' mortgages "in case said mortgages, or any of them, are

duly executed, dated and recorded prior to the date, execution and recording hereof," etc.

Testimony was heard as to exactly what was meant by the words "said mortgages or any of them are duly executed," etc., and it clearly appeared that the mortgagees in the mortgage simply wished to reserve to themselves all right to assail the validity of each and every of said prior mortgages, and to be bound only by such of them as might be valid and prior to its own. Plaintiff was fighting for priority, that is all. But it should not be allowed in this instance to avail itself of the insufficient verification of the prior mortgages described in its own mortgage, because, as said before, even though there were defective verifications of such mortgages, yet the mortgagees were in actual and undisputed possession of the mortgaged property by Harrison their agent, before and at the time plaintiff's mortgage was executed, and for the further reason that plaintiff's attorney was on the ground the day that Harrison took possession for the mortgagees with Atkinson's express consent, and had full notice of such actual possession before he secured the mortgage to this plaintiff. The testimony of Berry, counsel for plaintiff, is that Burchard & Pierse had given all these prior mortgages, and it was because of the amount of these liens and their possible validity that he pressed for the additional security of the freighting teams, etc. Under the facts, therefore, we do not think plaintiff is in any position to ask the court to ignore the possession by the other mortgagees of the stock of goods and other property included in their mortgages, and to adjudge their mortgage liens inferior to its mortgage. Just what lien upon the freighting outfit plaintiff had is immaterial in the case, because those chattels never were in plaintiff's possession, nor were they levied upon by the sheriff.

We find, therefore, that on July 31st, the mortgages stood in these positions: First, Atkinson's; next, defendant's Van Slyke & Co., then the several intervenors' in their respective orders, and finally the plaintiff's. On that day the plaintiff by its counsel, Mr. Berry, purchased the Atkinson mortgage,

then went up to Neihart and placed one Beech in charge. Berry delivered an order to Harrison, signed by Atkinson, first mortgagee, directing him to turn over possession to Berry. Berry only claimed to act for the plaintiff, under its own and the Atkinson mortgages. Harrison, forgetting apparently that he was the agent of other mortgagees and in possession for them as well as for Atkinson, delivered possession to Beech, an employe of Berry, who remained in sole charge until August 7th. It becomes important, therefore, to ascertain exactly what Beech's relation was toward the defendant Finch, Van Slyke, Young & Co. and the intervenors. If Harrison had refused to surrender the possession he held under all the mortgages except Atkinson's, the case would be less complicated; but evidently he acted entirely under Atkinson's instructions and walked out. But Atkinson had no authority to order Harrison to surrender any possession to plaintiff except such as he held under his own mortgage. He had theretofore consented to and acquiesced in the joint possession of the property by Harrison as the agent of the subsequent mortgagees as well as for himself, and so long as such mortgagees made no attempt to disturb his rights, his possession and theirs was jointly maintained by their one agent. Atkinson could not by his sole order divest other mortgagees of their possession, for beyond looking after his own interests he had nothing to do with their mortgages except by way of recognition of Harrison as their agent in possession with him. Therefore, Harrison should not have yielded to Beech any possession other than such as he held for Atkinson. But as he did give up to Beech, the question is: ought his principals, the mortgagees other than Atkinson, to lose their priorities of lien, or should Beech be regarded as holding possession for such other mortgagees as well as for Atkinson and this plaintiff?

We must remember that Berry well knew of all these prior mortgages and of the joint possession of all the mortgagees under them, which, as heretofore said, made the instruments valid. Therefore, when Berry purchased the Atkinson mort

gage for plaintiff and plaintiff went into possession under it by substituting Beech for Harrison. Beech should be regarded not alone as a mortgagee taking the same possession Atkinson had under the mortgage, but as assuming that possession for Atkinson's assignee recognizing those subsequent mortgagees for whom Harrison with Atkinson's consent agreed to act, and in whose right of possession Atkinson acquiesced so long as their rights were subordinate to his own. It would be most inequitable to hold that, because Harrison yielded to Beech in the manner he did, this plaintiff had a possession sufficiently good under Atkinson's mortgage to make that a valid first lien against the world, yet that Harrison's surrender subordinated the intervenors' mortgages to plaintiff's. The plaintiff having taken its last mortgage as well as the Atkinson mortgage with full knowledge of the intervenors' and defendants' actual possession and claims, cannot ask to be made first lien holder thus affirming the possession of Harrison, (recognized to be as well for others as for Atkinson), yet disaffirming that possession as for other mortgagees, in order to have its last lien precede others superior to its own.

The correct, and plainly the equitable view of the case is that, inasmuch as plaintiff knew of the possession under the preceding mortgages, which were valid and subsisting liens when Berry took possession, the priority of those liens over plaintiff's mortgage must be sustained, and that Atkinson's consent that Harrison should remain in possession for intervenors and defendants never having been withdrawn, Harrison's substitute Beech should be treated as having held for plaintiff by virtue of Atkinson's priority under the first mortgage, but that he held under the last mortgage as in subordination to the several other mortgages under which Harrison held and which were recited as subsisting mortgages in the plaintiff's mortgage.

We now advance to August 7th, upon which day Finch, Van Slyke & Co., defendants, sued Burchard & Pierse on their debt and attached the whole stock of goods which had been mortgaged to them by Burchard & Pierse. Before pro-

curing the writ of attachment they caused the balance due on the Atkinson mortgage to be deposited with the county treasurer to the order of the mortgagee. Finch, Van Slyke & Co. procured a judgment against Burchard & Pierse for the amount of their mortgage \$1,917.10. Under execution they sold the stock for \$5,372.75. After this present action was instituted, plaintiff accepted the \$3,100, deposited as balance due on the Atkinson mortgage. It is contended that the levy was void because the deposit was not made before the property was taken, as would seem to be required by section 1546, page 1071, Compiled Statutes, 1887. This question, however, becomes immaterial inasmuch as Finch, Van Slyke & Co. had no right to attach until they had exhausted their remedy by foreclosure sale under their mortgage lien. This has been decided in the case of *Largey v. Chapman*, ante, page 563. But the levy being void, should the defendants be deprived of their mortgage lien? We think not. There was no valid lien acquired by the attachment—there could not be if the mortgage lien was valid and subsisting. That their mortgage was valid has been heretofore decided. Therefore, as mortgagees they were obliged to exhaust their mortgage security before attachment, and they did not waive their claims under the mortgage in order to attach, unless estopped by facts and conditions not appearing in this case. The defendants, therefore, have a right to enforce their lien as the first of the mortgages given subsequent to the Atkinson mortgage.

Finally we inquire whether defendants were trespassers. Towards plaintiff they were not so far as the Atkinson mortgage is concerned, because when the plaintiff accepted the deposit of \$3,100 as fully liquidating the Atkinson mortgage, it waived that question. But as against these intervenors' rights and as against the plaintiff's lien under its last mortgage, defendants stand in a different light. The possession of Beech being a possession which should avail all the intervenors as well as the other mortgagees, when defendants, including the defendant sheriff, levied their attachment and sold the prop-

erty under execution they were trespassers, and notwithstanding the fact that Finch, Van Slyke & Co. had rights as mortgagees, they and the sheriff nevertheless became liable to the plaintiff mortgagee under its last mortgage and the intervenors' for the value of the property so converted. (Jones on Chattel Mortgages, § 448.)

The district court, we are advised, gave plaintiff judgment upon the ground that the intervenors never had possession, hence had no rights. Under this view the question of the value of the property converted became unimportant as the mortgagors have made no complaint. But under the ruling of this court the value is material; therefore, the cause must be sent back to the district court for re-trial of that question alone, and for judgment thereafter.

It being conceded by all parties that the plaintiff is entitled to the amount received by it on payment of the Atkinson mortgage, that feature of the case may be disregarded, and plaintiff should be allowed to retain the sum it received.

The single point to be re-tried is the value of the property at the time of the conversion. When this is determined by the court, the judgment should be that the liens stand in the order we have decided they maintain to one another, namely, first, plaintiff Atkinson's mortgage, then defendants' Finch, Van Slyke, Young & Co.'s mortgage, then the intervenors' mortgages in their respective orders and lastly the plaintiff by its own mortgage lien.

It should further be adjudged that defendants have been guilty of a conversion, and that although they are entitled to first be repaid the amount they have paid on the Atkinson mortgage, \$3,100, and to the amount of their own mortgage as prior to intervenors' and plaintiff Trust Company's mortgage, yet after receiving the amount of their said mortgage, to-wit: \$1,920, they are liable to intervenors and Trust Company for any sum in excess of the amount of their own mortgage, to the extent of the value of the property at the time of the conversion.

We think that the defendants should pay the costs of this

appeal. The judgment is therefore reversed and the case is remanded with directions to proceed as above stated.

Reversed.

PEMBERTON, C. J., and DE WITT, J., concur.

ON MOTION FOR REHEARING.

PER CURIAM.—Motion for rehearing is made upon the ground that the court overlooked the fact that the value of the property sold was agreed to be \$12,500 by stipulation of the parties at the trial, and that, therefore, the issue of value was eliminated from the case. But a re-examination of the record upon this point confirms us in our opinion that the question of value ought to be retried.

Plaintiff's complaint avers that when plaintiffs took possession of the property described in the chattel mortgage, its value was \$12,500. The defendants by answer denied this averment, or that the property was of any greater value than \$6,000. The same denial was made to intervenors' allegations of value. This was the condition of the pleadings as to the issue of value upon the day of the trial. Upon that date defendants filed an amended answer to the plaintiff's complaint. In this answer the defendants elaborately set forth the mortgage to themselves, and their contention that the plaintiff ought not to be permitted to assert any claim against defendants on account of their attachment of the goods, or to receive any moneys "of the value of said goods as found to be at the time of the taking until there shall have first been deducted and awarded to defendants other than the sheriff, the sum of \$3,100 so deposited by them and received by the plaintiff," etc. This pleading of the defendants amounted to a contention for the very rights which this court in the opinion preserved to them, and we think the language used demon-

strates that defendants insisted on an issue of the value. The plaintiff moved the court to strike out all such contentions of defendants, because they were sham and immaterial and constituted no defense. The court sustained this motion. Just when the order in relation to this motion was made does not clearly appear. It appears, too, that at the trial, on motion of intervenors, the court struck out substantially the same matter pleaded by the defendants in answer to the complaints in intervention. The admission of counsel, made prior to the trial, that no proof need be offered to sustain the allegation of that paragraph of the complaint to the effect that the value of the property was \$12,500, and that at the time of the trial the allegation of value was true seems to have been made for the purposes of the trial as the court viewed the issues to be tried.

Under the view we took of the case, the matter contained in paragraph B, which was stricken out, constituted proper defenses. The defendants could never have meant to surrender the issue of value so long as their defenses stood raising that issue. But when the court struck out the paragraphs pertaining to the value of the property, it would seem that proof upon that issue then became immaterial because of the ruling of the court. Upon the argument of the case in this court, we were advised by the counsel that the district court was of the opinion that defendants and intervenors never had possession of the property, and that, therefore, they had no rights. If such were the views of the district court at the time of the trial, plainly the defendants could not rely upon the issue of value: therefore proof upon that issue may have been dispensed with by an admission that, because of the ruling of the court, for the purposes of that trial the value might be taken as greater than the pleadings themselves had confessed it to be. It is difficult for us to believe from all the pleadings filed and proceedings had and from their brief filed herein that the learned counsel for the defendants intentionally abandoned the issue of value, and thus practically abandoned their pleaded case; for, if their defense of value could prevail, its advantage

to them would be to show a value lower than the amount of the claims of the plaintiff and intervenors.

The record is not as clear as it should be as to how the stipulation came to be made, but, inasmuch as the issue of value has become so very important under our opinion, and was so immaterial in the lower court, we do not feel justified in holding that any ambiguities in the record should deny to the defendants the opportunity to retry the issue, especially when defendants contend they did not waive the issue at all.

Rehearing denied.

BENHAM, APPELLANT, v. THE LEMHI MINING, MILLING AND REDUCTION COMPANY, RESPONDENT.

[Submitted November 13, 1896. Decided November 16, 1896.]

APPEAL—*Insufficient specification of errors.*—A mere statement in a notice of intention to move for a new trial that it is based "on the ground of errors in law occurring at the trial and excepted to by the plaintiff," is a wholly insufficient specification of errors.

SAME—*Error in refusing to admit evidence—Insufficiency of record.*—Where the record on appeal does not contain the evidence in chief introduced by the plaintiff nor the evidence introduced by the defendant, alleged error in the refusal of the court to permit the plaintiff to introduce certain evidence in rebuttal cannot be considered.

Appeal from Second Judicial District, Silver Bow County.

ACTION to recover for services. Judgment was rendered for the defendant below by McHATTON, J. Affirmed.

Statement of the case by the justice delivering the opinion.

By this action plaintiff seeks to recover of the defendant the sum of \$1,750, claimed to be a balance due plaintiff for his services as superintendent of the mining and milling operations of the defendant in Idaho and Montana. The answer admits the services, but denies the value thereof, and also pleads a counterclaim. The replication denies the counterclaim. The case was tried to the court with a jury. A verdict was

rendered for the defendant and judgment entered thereon. The plaintiff appeals from the judgment and order denying a new trial.

Stephen De Wolfe, for Appellant.

J. W. Cotter, for Respondent.

PEMBERTON, C. J.—The respondent contends that this court cannot consider the appeal in this case, for the reason that the record nowhere contains any specification of errors.

Plaintiff's notice of intention to move for a new trial is based "on the ground of errors in law occurring at the trial and excepted to by the plaintiff." An inspection of the record discloses that this is the only attempt at any specification of errors. The record contains nowhere any other pretense of a specification of errors. We are, therefore, at a loss to determine from an inspection of the record what errors were assigned and specified as grounds for a new trial in the court below, if in fact any errors were assigned.

The principal ground of error contended for in appellant's brief is that the court refused to permit the plaintiff to introduce certain evidence, claimed to be rebuttal; but the respondent says in his brief that the plaintiff in opening the case, and in introducing his testimony in chief, went thoroughly into the case, including the plaintiff's evidence and cause of action, as well as all matters of the defense set up in the answer, and that the evidence which plaintiff sought to introduce under the claim of rebuttal was substantially the same evidence which the plaintiff had introduced in his evidence in chief. But, however this may be, the record does not contain the evidence in chief introduced by the plaintiff, nor the evidence introduced by the defendant, which plaintiff offered to rebut, and which he complains that the court would not permit him to do.

Under these circumstances, if there were in the record sufficient specifications of errors to enable us to consider the case, still we could not determine whether the evidence sought to

be introduced, and which was excluded by the court, was rebuttal or not. Under these conditions, and in view of the insufficient record in the case, the presumption is that the action of the court in the matters complained of was correct.

We are, therefore, of opinion that the judgment and order appealed from should be affirmed, and it is so ordered.

Affirmed.

HUNT, J., concurs. DE WITT, J., not sitting.

MADDOX, APPELLANT, v. TEAGUE, ADMINISTRATOR, ET
AL. GADDIS, INTERVENOR, RESPONDENT.

[Submitted November 11, 1896. Decided December 21, 1896.]

INTERVENTION—Joint mortgagees.—Where one of two joint mortgagees institutes an action against the sheriff on his official bond for failure to pay over the proceeds of a sale of the mortgaged property in satisfaction of his claim, which is alone sufficient to exhaust the penalty of the bond, the other mortgagee, whose claim is likewise unpaid, has such an interest in the matter in litigation as to entitle him to intervene. (*Maddox v. Rader*, 9 Mont. 126, affirmed.)

Appeal from Ninth Judicial District, Meagher County.

ACTION on sheriff's bond. Judgment was rendered for the plaintiff and intervenor below by HENRY, J. Plaintiff appeals from the judgment in favor of the intervenor. Affirmed.

Toole & Wallace, for Appellant.

Respondent should not have been permitted to intervene. (*Horn v. Volcano Water Co.*, 13 Cal. 62; *Smith v. Gale*, 144 U. S. 509; *Lewis v. Harwood*, 28 Minn. 428; *Speyer v. Ihmels*, 21 Cal. 287; *Gradwohl v. Harris*, 29 Cal. 154; *Stich v. Dickenson*, 38 Cal. 611; *Pomeroy on Rem.* § 423-431; note to *Brown v. Saul*, 19 Am. Dec. 181; *Cook v. Dillon*, 74 Am. Dec. 354, 356; *Governor v. Hicks*, 12 Ga. 186; *Rhodes v. Booth*, 14 Ia. 575; 2 Am. & Eng. Ency. of Law, 467, g. note 3.)

Carpenter & Carpenter, for Respondent.

Gaddis had a right to intervene. (See cases cited in *Maddox v. Rader*, 9 Mont. 131; see, also, *Durfee v. Grinnell*, 69 Ill. 371; 1 Beach on Mod. Eq. Jur. § 465; *Penzel v. Brookmire*, 50 Ark. 105; *Coburn v. Smart*, 53 Cal. 742.)

DE WITT, J.—We have here another appeal in the case in which we rendered a decision, reported *ante*, page 512. This appeal is by the plaintiff below as against the intervenor Gaddis. Appellant here alleges error of the court below in allowing the intervention of Gaddis. For a statement of the case see the former decision, *ante*, page 512, and also the decision on the first appeal, 9 Mont. 126.

Gaddis, the intervenor and respondent here, defends the action of the lower court in allowing him to intervene upon two grounds. First: That the allowance of intervention is now the law of the case, for the reason that it was decided in the old appeal, 9 Mont. 126; Second: That the decision upon this question in 9 Mont. is correct in law.

The decision upon the first appeal that Gaddis had a right to intervene, was made upon a stipulation of counsel that the court should decide that question. (See page 136, 9 Mont.) A dissenting opinion in that case, however, contends that the court had no jurisdiction to decide that point, because no appeal had been taken by the party alleged to have been aggrieved. We shall not now determine whether the decision in that respect, made by the court on the old appeal, is now the law of the case, because we are of the opinion that the decision was correct in law and may now be so held as an original question. The reasons for the correctness of the decision, we are of opinion, are well set forth in the opinion upon the first appeal. (Page 137, 9 Mont.) See also the authorities cited by the respondent Gaddis in that case. See, also, *Coburn v. Smart*, 53 Cal. 742.

Upon the question of division of the proceeds of a mortgage securing several notes, we also add the following remarks in 1 Beach on Modern Equity Jurisprudence, § 465.

“But the weight of authority, especially of the more recent decisions, is that the proceeds should be applied *pro rata* in part payment of the several notes, irrespective of their dates of maturity or assignment; and this rule would seem to be the most equitable, and not less upon purely technical distinctions.” (See, also, cases cited in this text.)

We are certainly of opinion that Gaddis—the third person—had an interest in the matter in litigation. The matter in litigation was the only security by which he could realize upon his note. Adopting the language of Mr. Pomeroy, quoted in 9 Mont., we think it is true that if the original action of Maddox had never been commenced, and Gaddis had first brought the action as sole plaintiff, he would have been entitled to recover in his own name to the extent, at least, sought.

It is, therefore, ordered that the judgment in the case be affirmed.

Affirmed.

PEMBERTON, C. J., concurs. HUNT, J., disqualified.

IN RE STEWART'S ESTATE.

[Submitted November 12, 1896. Decided November 16, 1896.]

ADMINISTRATION—Minority of widow—Right to nominate administrator.—Section 55 of the probate practice act (1887) providing that letters of administration must be granted, first, to the surviving husband or wife, “or some competent person whom he or she may request to have appointed,” preserves to a widow, who is disqualified under section 59 *Id.*, by reason of minority, the right to nominate a person legally qualified to apply for letters of administration and such person is entitled to be appointed in preference to the public administrator.

SAME—Same.—Section 58 of the probate practice act (1887) which provided that “if any person entitled to letters is a minor, letters must issue to his guardian or any other person entitled to letters of administration in the discretion of the court,” had application to minors generally other than to a surviving husband or wife under the age of majority yet old enough to lawfully contract the marital relation. As to minors sustaining such relationship the statute giving the right to nominate is special and controls.

Appeal from Fourth Judicial District, Missoula County.

PETITION for letters of administration. Orders granting

the petition of the public administrator and denying the petition of a person nominated by the decedent's widow were made by WOODY, J. Reversed.

Statement of the case by the justice delivering the opinion.

John P. Stewart died intestate at Missoula county, on March 24th, 1895. He left an estate valued at about \$15,000. There survived him his wife, aged sixteen years, and one minor child. On March 30th, 1895, the public administrator petitioned for letters of administration. On April 4th, thereafter, John M. Keith, the appellant herein, filed a protest against the right of the public administrator to letters, based upon the ground that the decedent left a widow, Mary Stewart, residing in Missoula county, who in writing had especially named and requested that the said Keith be granted letters of administration. Regular application for letters was made by Keith. Upon April 1, Mrs. Stewart filed a written consent and request that Keith be appointed administrator of the estate of her deceased husband, and she expressly waived her right as his wife to qualify, in favor of said John M. Keith. The court overruled the objections of Keith and denied his petition for letters, and ordered that letters of administration should issue to W. B. Brooks, the public administrator. Keith duly excepted and appeals to this court from the judgment and order rejecting his petition for appointment and allowing the petition of Brooks, and from the order appointing Brooks administrator of the estate.

Marshall & Corbett, for Appellant.

HUNT, J.—The point for decision is this: Which has a better legal right to administer the estate of the deceased, Brooks, as public administrator, or Keith, in whose favor the widow relinquished any rights she may have had?

The sections of the Probate Practice Act, Compiled Statutes, 1887, applicable to the controversy, are as follows:

Section 55. "Letters of administration on the estate of a

person dying intestate must be granted to some one or more of the persons hereinafter mentioned, who are respectively entitled thereto, in the following order :

“First. The surviving husband or wife, or some competent person whom he or she may request to have appointed.

“Second. The children.

“Third. The father and mother.

“Fourth. The brothers.

“Fifth. The sisters.

“Sixth. The grandchildren.

“Seventh. The next of kin entitled to share in distribution of the estate.

“Eighth. The public administrator.

“Ninth. The creditors.

“Tenth. Any person legally competent.

“If the decedent was a member of a co-partnership at the time of his death the surviving partner must in no instance be appointed administrator of the estate. And provided further, that no person who is not a resident of this state shall be appointed administrator,” etc.

Section 59. “No person is competent to serve as administrator or administratrix, who, when appointed, is

“First. Under the age of majority.

“Second. Convicted of an infamous crime.

“Third. Adjudged by the court to be incompetent to execute the duties of the trust by reason of drunkenness, improvidence, or want of understanding or integrity.”

The respondent's contention must be that, where the widow is a minor, she is necessarily incompetent to serve herself, and that inasmuch as she is incompetent to serve herself, she is also incompetent to name some competent person whom she may request to have appointed. But we do not think this contention can be sustained. The first right to administer is granted to the surviving husband or wife; yet it might often happen that such survivor would be by non-residence, or other disqualification, incompetent to serve. But the statute, as if made especially to cover such a contingency, gives

to the surviving husband or wife the right to name some competent person who can serve. This right of the surviving husband or wife to nominate is not made dependent upon the competency to serve of the person occupying such relationship. It is a right of nomination given by virtue of the fact that the person who exercises it stands in the relationship of surviving husband or wife; it is independent of the competency of such husband or wife himself or herself, to serve. The person named for appointment by such surviving husband or wife must be legally qualified as required by section 59, above quoted. But we must not lose sight of the distinction between the right to name the one who shall serve, and the competency of the person who does serve, for the distinction makes the case simple.

A question analogous to this arose in *Estate of Cotter*, 54 Cal. 215, where statutes like the provisions of the Montana code were construed. In that case the wife was a non-resident. She requested that letters be granted to one Thomas Crane, a competent person. The public administrator objected and claimed he had a right to administer the estate. The court held that the statutes prevented anyone from serving who was a non-resident of the state, and the wife, being a non-resident, could not serve, but that, although she could not act as administratrix, yet the law did not deprive her of the right to name some one who could act, provided always, the person suggested by her was competent to serve. The court in that case said :

“The statute does not make the right of the surviving husband or wife to nominate depend upon the matter of residence, and there would be no reason in such requirement. There may be, and doubtless are, however, very good reasons for the provision which declares that no person shall *serve* as administrator or administratrix who is not a *bona fide* resident of the state; but this inhibition, and the reasons for it, only goes to the right of the non-resident surviving husband or wife to *serve* in that capacity, and does not abridge or conflict with the right expressly conferred by section 1365 upon the

“competent person whom he or she may request to have appointed.”

A like construction of the statutes of California was adopted *In re Stevenson*, 72 Cal. 164. Both of these decisions were expressly affirmed in *Estate of Dorris*, deceased, 93 Cal. 611. In the latter case the court recognize the policy of the law that the surviving husband or wife shall have administrative control, if desired, and that therefore such survivor, or his or her nominee, if competent and fit, has an absolute right. (*In re Bedell*, 97 Cal. 339.)

There was a statute of Montana, section 58, Probate Practice Act, Compiled Statutes of 1887, which provided that if the person entitled to letters is a minor, letters must issue to his guardian or any other person entitled to letters of administration in the discretion of the court. But we think that statute applies to minors generally other than to a surviving husband or wife under the age of majority, yet old enough to lawfully contract the marital relation. As to minors sustaining such marital relationship, the statute giving the right to nominate is special and controls.

The order of the district court is reversed and the cause remanded with directions to deny the application of Brooks for letters of administration, and to grant the petition of appellant Keith for letters, if he is a competent person.

Reversed.

PEMBERTON, C. J. concurs. DE WITT, J., not sitting.

INDEX.

ABANDONMENT.

Of water right, see **WATER RIGHTS**, 7, 8, 9.

ADVERSE POSSESSION.

Of water right, see **WATER RIGHTS**, 6.

Where entry not made under paper title, see **EJECTMENT**, 1.

ADMINISTRATORS.

See **EXECUTORS and ADMINISTRATORS**.

AGENCY.

See **PRINCIPAL and AGENT**.

AGREED CASE.

Uncontradicted testimony becomes in effect, see **APPEAL**, 11.

AMENDMENTS.

Allowance of, during trial, see **TRIALS**, 2.

Allowance of, after case remanded, see **APPEAL**, 6.

Not objected to, review of, see **APPEAL**, 9.

To statement of election contest, see **ELECTIONS**, 2, 3.

To notice of motion for new trial, see **NEW TRIAL**, 5, 6.

APPEAL.

See **NEW TRIAL**.

By executrix from order of partial distribution, see **EXECUTORS and ADMINISTRATORS**, 3, 4.

1. Under section 2321, Penal Code, providing that upon an appeal taken by the defendant from a judgment the court may review any intermediate order or "ruling involving the merits or which may have affected the judgment," rulings of the trial court upon matters of law in the exclusion or admission of testimony during the progress of the trial may be brought before this court by bills of exception on an appeal from the judgment without a motion for a new trial; but this section does not permit the review, on an appeal from the judgment only, of matters embraced within any of the cases for which a new trial may be granted under section 2192, *Id.*, except errors in the decision of questions of law during the trial, which may be reviewed either by appeal from the judgment or from an order denying a motion for a new trial. (*State v. Whaley*, 16 Mont. 594, distinguished.)—*State v. O'Brien*, 1.
2. A bill of exceptions imports verity, and, it being the duty of the trial judge not merely to sign what is presented as a bill of exceptions but to examine it and make it conformable to the facts, the appellate court will assume that a bill, certified by the judge to contain all the evidence bearing upon the exception taken, is correct.—*Id.*
3. Where an appellant's only appearance in the supreme court is by the brief of an attorney who, since the appeal, has been disbarred for dishonorable and unprofessional conduct, the appeal will not be considered and the judgment therefore affirmed.—*Engesser v. Northern Pacific R. R. Co.*, 31.

4. The supreme court will decline to consider a brief filed by an attorney who has been disbarred since the taking of the appeal.—*Stebbins v. Morris*, 32.
5. Possible error in the admission and exclusion of testimony as to assays of ores, is not ground for reversal where the value of the ores was considered by the jury and their finding upon the matter was not attacked. (*Merchant's National Bank v. Greenwood*, 16 Mont. 386, cited.)—*Gassert v. Black*, 35.
6. In an equity action where the complaint defectively states what may be a good cause of action and a demurrer to the complaint is sustained for ambiguity, and the plaintiff's counsel elects to stand on the complaint, but after an appeal is taken is disbarred from practice, the supreme court under such circumstances, while approving the ruling of the lower court, will remand the case with leave to amend.—*Ryan v. Speth*, 45.
7. The appellate court will not review remarks made by the prosecuting attorney in argument to the jury, and claimed to have been prejudicial to the defendant, where no objections were made at the time and the court was not requested to instruct the jury to disregard them. (*State v. Biggerstaff*, 17 Mont. 510, cited.)—*State v. Gay*, 51.
8. In an action for damages for removing timber from respondent's land where the jury returned a verdict of \$300 in two items, one for \$600, the value of the timber, and one for \$200 the damages to the land, and a new trial was directed on appeal because the appellate court was unable to determine to what extent elements upon which the proof was legally insufficient entered into the latter finding, the judgment will be modified on rehearing by reducing it \$200 upon the offer of the respondent to wholly remit that portion of the verdict.—*Nelson v. Big Blackfoot M. Co.*, 125.
9. The allowance of an amendment to a pleading, not objected or excepted to at the time, will not be reviewed on appeal.—*Sanford v. Newell*, 126.
10. A statement on appeal containing the evidence and the exceptions saved by the appellant is a part of the judgment roll and where no motion for a new trial is made, or appeal taken within sixty days, the errors alleged in the bills of exceptions, contained in the statement may be reviewed on an appeal from the judgment taken within one year after the rendition thereof. (*Lockey v. Horsky*, 4 Mont. 463; *Tuell v. Tuell*, 6 Mont. 19; *Kleinschmidt v. Her*, 6 Mont. 123, reviewed and explained.)—*Emerson v. Eldorado D. Co.*, 247.
11. Where neither the testimony offered by the plaintiff and defendant is contradicted by the adverse party, the testimony before the court becomes virtually an agreed statement of facts and as such is properly a part of the judgment roll. (*Hartman v. Smith*, 7 Mont. 9, cited.)—*Id.*
12. Where there is no conflict in the evidence and the court directs a verdict and decides the case either for plaintiff or defendant this is equivalent to a judgment of non-suit and reviewable as such on appeal. (*McKay v. Montana Union Ry. Co.*, 13 Mont. 15; *Creek v. McManus*, 13 Mont. 152, cited.)—*Id.*
13. The ruling on a motion for a non-suit may be reviewed either on motion for a new trial or on an appeal from the judgment. (*Kleinschmidt v. McAndrews*, 117 U. S. 282; *McKay v. Montana Union Ry. Co.*, 13 Mont. 15, cited.)—*Id.*
14. A specification of error in the statement on appeal that "The court erred in overruling and denying plaintiff's motion for judgment at the close of defendant's case" is sufficient to permit a review of the ruling.—*Id.*
15. Questions as to misjoinder of parties and that several actions are improperly united will not be considered on appeal when the demurrer was not specific and the defendants answered after it was overruled.—*Largey v. Bartlett*, 265.
16. The dismissal of an action is in effect a final judgment, and where a motion for a non-suit is granted and an order made dismissing the action and giving judgment for costs, an appeal will lie from such order, as a judgment.—*Holter Lumber Co. v. Fireman's F. Ins. Co.*, 262.
17. A specification of error, which states that the court misdirected the jury in a material matter of law, by giving to the jury certain instructions, described by number, because said instructions did not state the law correctly and were not applicable to the case, is too general to permit the review of the instructions on appeal. (*Woods v. Berry*, 7 Mont. 195, cited.)—*State v. Mason*, 382.
18. Error, if any, in sustaining an objection to a question is harmless where the witness

had previously answered substantially the same question without objection.—*Cannon v. Lewis*, 402.

19. An assignment of error as to the admission of testimony will not be considered on appeal where the appellant fails to point out the testimony in his brief by reference to the page in the transcript.—*Congdon v. Oide*, 487.
20. A motion to strike out a portion of a replication as being a departure from the complaint will be held to have been properly overruled where the motion failed to point out in what the alleged departure consisted.—*Maddox v. Teague*, 512.
21. Objections to testimony on the trial which fail to point out the grounds upon which the objections are made will not be considered on appeal. (*State v. Black*, 15 Mont. 148, cited.)—*Id.*
22. Where the record on appeal does not contain the evidence in chief introduced by the plaintiff nor the evidence introduced by the defendant, alleged error in the refusal of the court to permit the plaintiff to introduce certain evidence in rebuttal cannot be considered.—*Benham v. Lemhi M. M. & R. Co.*, 591.

ASSIGNMENT.

Assignee of contract may set up fraud, see FRAUD, 4.

Where one to whom money is to become due upon the performance of a contract gives a creditor an order on the debtor for the money, to be paid when due, this is an equitable assignment of property to be acquired in the future, creating in the creditor an interest in the fund which equity will enforce, though the debtor did not accept the order or assent to the transfer.—*Merchants and M. Nat. Bank v. Barnes*, 335.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. An assignment for the benefit of creditors which empowers the assignee to sell and dispose of the assigned property as he may deem best, either for cash, or on time, or for credit, is fraudulent and void as to creditors.—*Rosenstein v. Coleman*, 459.
2. Section 231, Fifth Division of the Compiled Statutes making the question of fraudulent intent in all conveyances one of fact and not of law, does not preclude the court from adjudging fraudulent an assignment which on its face permits the assignee to sell on credit, since an intention to hinder, delay and defraud creditors is a necessary legal inference from a provision permitting credit sales, and is as conclusive upon the assignor as if he had in express terms admitted a fraudulent intent.—*Id.*

ATTACHMENT.

Action against garnishee by judgment creditors, see JUDGMENT, 12.

By mortgagee, see CHATTEL MORTGAGES, 6, 7.

1. Where a creditor holding a junior attachment on defendant's property, intervened in the action of the prior attaching creditor against the defendant and alleged that notes sued on by the original plaintiff were given the defendant company as the consideration for the pretended purchase by it of the plaintiff's stock in the company, and were void, a finding that the notes were not given for the stock, but for real and personal property sold by the plaintiff to the defendant company, is supported by evidence that at the time of the organization of the company, the capital stock of which consisted of 150,000 shares, the three trustees issued to themselves each one share of the capital stock of the company and a certificate for the balance of the stock to the plaintiff, upon which was endorsed an assignment transferring the stock to the company, which plaintiff immediately signed and redelivered; that the transaction was at the request of the trustees and done for their accommodation and wholly without consideration, and that thereafter the defendant company purchased of the plaintiff real estate and personal property, paying therefor part cash and the balance in the notes sued on with 125,000 shares of its capital stock as collateral security.—*Parberry v. Woodson Sheep Co.*, 817.
2. A finding that the claims of an attaching creditor, for which the defendant company had issued stock as collateral security, was not secured by any mortgage, lien or

pledge upon real or personal property, at the time of the commencement of his action, is supported by evidence that the defendant company was then in debt \$88,000 with assets estimated at from \$25,000 to \$49,000; that plaintiff, prior to beginning suit, mailed the stock which he considered of no value to the company's president; that the latter was then absent from the state, and the stock was re-mailed to plaintiff by another person who appeared to represent the president of the company, and was received by a person in plaintiff's office and never actually returned to plaintiff; that on the return of the company's president the stock was delivered to him and retained without objection. In such case the plaintiff could waive his rights to the pledge of the stock as security for his debt and attach the defendant's property.—*Id.*

3. An officer, who, upon the instructions of a judgment creditor, garnishees a debt due to the judgment debtor and applies on the execution money received from the garnishee, who paid it over without objection, is not liable therefor in an action for money had and received to another creditor to whom the judgment debtor had given an order on the garnishee for the money prior to the garnishment, though he is notified by the latter of his claim to the debt, both before and after receiving the money from the garnishee.—*Merchants & Miners' National Bank v. Barnes*, 385.
4. The admission by a garnishee of an indebtedness to a judgment debtor and payment of the money to the officer levying the writ, does not relieve him from liability to one to whom the judgment debtor had transferred his claim prior to the garnishment and with the knowledge of the garnishee.—*Id.*
5. Under section 200 of the Code of Civil Procedure (1887) providing that the defendant in an attachment may apply on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, that the attachment be discharged on the ground that the writ was improperly issued, both the notice and motion should specifically state the grounds upon which the motion is based. The plaintiff cannot be required to resort to an affidavit filed in support of the motion in order to determine the grounds upon which the defendant may be intending to rely.—*Omaha Upholstering Co. v. Chauvin Fant F. Co.*, 468.
6. On motion to discharge an attachment on the ground that the writ was improperly issued, it is not within the scope of the inquiry to try the merits of the main action. (*Newell v. Whitwell*, 16 Mont. 243, cited.)—*Id.*
7. A surety on a promissory note whose liability has been secured by a chattel mortgage cannot, upon being obliged to pay the note, waive the mortgage security and proceed by attachment against his principals to recover the debt, but must foreclose the mortgage as required by section 358 of the Code of Civil Procedure (1887) relating to the foreclosure of mortgages and providing that "there shall be but one action for the recovery of any debt, or the enforcement of any rights, secured by mortgage upon real or personal property, which action shall be in accordance with the provisions of this chapter." (*Parberry v. Woodson Sheep Co.*, ante, 317, distinguished.) But this decision does not affect the question of enforcing the debt by exercising a power of sale contained in the mortgage. (*First National Bank v. Bell S. & C. M. Co.*, 8 Mont. 32, cited.)—*Largay v. Chapman*, 563.
8. The plaintiff in attachment being required to make an affidavit stating that the debt is not secured by a mortgage, lien or pledge upon real or personal property, or, if so secured, that the same has become insufficient by the act of the defendant or by any means has become nugatory, a judgment on the pleadings for the defendant in an attachment suit is proper where the answer alleged that the indebtedness was secured by a chattel mortgage which had never been foreclosed, and there was no averment in reply that the security had become nugatory or that it had become insufficient by the acts of the defendants.—*Id.*

ATTORNEY.

Appearance through disbarred, see APPEAL, 3, 4.

Remarks of, in argument, see APPEAL, 7.

Complaint in action by, see PLEADING, 1.

Fees on lien foreclosure, not recoverable in supreme court, see MECHANIC'S LIENS, 3.

AUCTION SALE.

Of mortgaged chattels, liability of sheriff for credit sales, see **SHERIFF**, 1.

BONDS.

Of county, limit of indebtedness, see **COUNTIES**, 1, 2.

Official, see **COUNTY ASSESSOR**, 1, 2, 3.

BRIDGE.

Liability of city for repairs of, see **STREETS and HIGHWAYS**, 1.

BRIEFS.

Must refer to pages in transcript, see **APPEAL**, 19.

BUILDING AND LOAN ASSOCIATION.

Action against, to recover subscription, see **CORPORATIONS**, 5, 6.

CERTIORARI.

Order directing special administrator to pay claim, reviewable on, see **EXECUTORS AND ADMINISTRATORS**, 9, 10.

The issuance of an execution by a justice of the peace is a judicial act and where he has inserted in the writ the name of one who is a stranger to the judgment, *certiorari* will lie to review his act on. In such case an action in trespass for damages is not a speedy or adequate remedy, nor would the relator be required to move in the justice court that the execution be set aside.—*State ex. rel. Simpson v. Votaw*, 279.

CHATTEL MORTGAGE.

Foreclosure of, liability of sheriff for credit sale, see **SHERIFFS**, 1.

Waiver of security in attachment, see **ATTACHMENT**, 7, 8.

Intervention by joint mortgagee, see **INTERVENTION**, 3.

1. Section 5182 of the Political Code providing that the repeal of the old statutes should not "abridge, abolish or impair any vested right, nor should such repeal change the force and effect of any act done or judgment rendered," preserved rights founded upon past transactions, and therefore the chattel mortgage law of the code of 1895 could not affect chattel mortgages given prior to its adoption so as to exchange their priorities as fixed by the former law.—*Chicago Title & Trust Co. v. O'Marr*, 568.
2. Where one holding a first mortgage upon a stock of merchandise enters into possession of the stock and conducts the business through an agent and thereafter the mortgagor executes other mortgages upon the same stock, and the agent for the senior mortgagee consents to act and does act as agent for the junior mortgagees also, the possession of the agent then becomes the joint possession of all the mortgagees, in which case the purchase of the senior mortgage by one holding the last mortgage, with knowledge that the agent was holding under all the preceding mortgages, and the substitution of his own agent, to whom possession was surrendered, does not operate to subordinate the intermediate mortgages to the lien of the last mortgage.—*Id.*
3. The invalidity of a chattel mortgage as against third parties, arising from a defective affidavit, is cured by the mortgagee taking actual possession of the mortgaged goods before the acquisition of rights by such third parties. (*Leopold v. Silverman*, 7 Mont. 266, cited; *Marcum v. Coleman*, 10 Mont. 78; *Milburn Manufacturing Co. v. Johnson*, 9 Mont. 542, distinguished).—*Id.*
4. A description of mortgaged property as "the freighting outfit of B. F. & P. consisting of sixteen head of horses, all freight wagons and harness, being same property described in mortgage given to First National Bank of Nelhart, Montana, and bearing same description. This mortgage subject to the mortgage of First National

Bank aforesaid for \$1,500, kept in Nelhart and on road freighting, more particularly described as follows,"—is sufficient not only as between the parties to the mortgage but as to third parties as well, without a more specific description being added after the words "as follows."—*Id.*

5. The insertion in a chattel mortgage of a more particular description of the property, made by the mortgagee's attorney after the mortgage had been executed and acknowledged by the mortgagors, but with their express consent, does not render the mortgage void as against third parties where no rights intervened, and the description as given at the time of execution of the mortgage was sufficient without further particularization.—*Id.*
6. A creditor whose debt is secured by a mortgage has no right to proceed against his debtor's property by attachment until his mortgage security has been exhausted by foreclosure, but the fact that an attachment is issued under such circumstances does not operate as a waiver of the mortgage lien in the absence of the facts creating an estoppel. (*Largey v. Chapman, ante, page 563, cited.*)—*Id.*
7. Where a creditor holding a chattel mortgage upon a stock of merchandise, upon which there is a prior mortgage and also several mortgages subsequent to his, deposits the amount of the prior mortgage with the county treasurer as permitted by statute, and, disregarding the subsequent mortgages which were valid liens, attaches the property and sells it under execution, he and the sheriff are trespassers and liable to the subsequent mortgagees for the value of the property so converted in excess of the amount of his own mortgage.—*Id.*
8. A motion for rehearing in such case made upon the ground that the value of the property sold under the defendant's execution was stipulated on the trial to be \$12,500, and for that reason a new trial for the purpose of determining the value of the property converted was unnecessary, will be denied where it appeared from the record that the court struck out the defendant's allegations raising an issue as to the value, rendering proof upon that point immaterial, and it seemed that the stipulation was made for the purpose of the trial as the court viewed the issues to be tried.—*Id.*

CITY ORDINANCE.

A complaint for vagrancy under a city ordinance should not be dismissed because the charging part of the complaint concludes with scandalous matter, but such matter should be stricken out where the complaint, independently of the objectionable matter, sufficiently sets forth the offense.—*City of Butte v. Peasley, 308.*

CLAIM AND DELIVERY.

See REPLEVIN.

CONSTITUTIONAL LAW.

Limit of indebtedness by counties, see COUNTIES, 1.

Power of board of equalization to raise valuation, see TAXATION, 2.

1. The Code of Civil Procedure of 1895 (§3265) making a malicious and guilty intent a conclusive presumption from the deliberate commission of an unlawful act for the purpose of injuring another, is not *ex post facto* as to a homicide committed prior to its adoption, in that it changes the rules of evidence and declares a force to evidence greater than that existing under the former statute (§19, Fourth Division of the Compiled Statutes) defining express malice to be "that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof," since express malice is composed of the same elements of fact in each statute, all of which must be proved by competent evidence beyond a reasonable doubt, and each of which is rebuttable.—*State v. Gay, 51.*
2. Section 1235 of the Code of Civil Procedure of 1895, allowing judgment debtors one year in which to redeem, is applicable to a decretal sale of mortgaged premises thereafter made although at the time the mortgage was given the period of redemption was six months. Such extension of the period for redemption does not impair

the obligation of the contract between the mortgagor and the mortgagee when the latter becomes the purchaser, because by purchasing his character as mortgagee ceases and he necessarily subjects himself to the law then in force defining the rights of purchasers. Nor is the obligation of the contract impaired by the fact that such extension may tend to reduce the number and amount of bids at the foreclosure sale, for such contingencies are too remote to justify the conclusion that such legislation affected the value of the mortgage contract.—*State ex rel. Thomas Cruse Sav. Bank v. Gilham*, 94.

3. Sureties upon the official bond of a county assessor, upon whom was imposed by statute the duty of collecting poor taxes, and whose bond was conditioned that he would pay over the moneys so collected, are estopped from contending that the statute imposing such duty is in conflict with section 5, Article VI of the constitution, which provides that the county treasurer shall be collector of taxes.—*Commissioners of Meagher Co. v. Gardner*, 110.
4. The legislature has full power to enact a license law unless it is forbidden by the constitution.—*State v. Camp Sing*, 128.
5. In construing a constitutional provision the proceedings and debates of the framers of the constitution may be examined as tending to show what its terms were understood to designate and include.—*Id.*
6. A constitutional provision should not be so construed as to nullify a law unless it is clear that such a construction was intended.—*Id.*
7. The word "also" in the last sentence of section 1, article XII of the constitution, providing that "The legislative assembly may also impose a license tax both upon persons and upon corporations doing business in the state," which follows the provision that the revenue for the support of the state shall be provided for by taxes, was not used to carry over into the sentence where it occurs the idea expressed in the sentence preceding it, to the effect that the legislature may also impose license taxes for the support of the state, but was used simply to connect the idea of the two systems of revenue, and therefore the imposing of license taxes is not restricted to the purposes of state revenue alone.—*Id.*
8. A license tax is not within the inhibition of the constitution (§ 4, Article XII) that the legislative assembly shall not levy taxes upon the inhabitants or property in any county, city or town, or municipal corporation, for county, town or municipal purposes, but it may by law vest in the corporate authorities thereof powers to assess and collect taxes for such purposes. The intent of this section and section 1, *Id.*, to refer to taxation proper, and not to licenses, is expressed in the use of the words "levy," "assess," and "rate," when speaking of taxes, and the use of the word "impose," when speaking of licenses.—*Id.*
9. The laundry license tax law (Political Code, §§ 4079 *et seq.*) which allows seventy per cent. of the licenses to be retained by the county, is not repugnant to section 4, article XII of the constitution, as levying a tax upon the inhabitants or property in a county for county purposes.—*Id.*
10. Section 687, Fifth Division of the Compiled Statutes, declaring the liability of the corporation to an employe injured through the negligence of his superior to be the same as if the employe were a passenger, being originally part of an act for the incorporation of railroad companies in the territory, and having application only to corporations created under such act, imposes upon domestic railroad companies a burden not imposed upon foreign railroad companies operating within the state and was therefore annulled by the adoption of the state constitution, in which (§ 1, Article XV) foreign corporations are prohibited from enjoying within the state any greater privileges than enjoyed by like corporations created under the laws of the state.—*Criswell v. Montana Central Ry.*, 187.
11. Section 11, Article XV of the constitution, declaring in effect that domestic corporations shall not be discriminated against in the enjoyment or possession of rights and privileges that may be accorded to foreign corporations of like character, is self executing as a prohibition, but not as an affirmative imposition upon, or securement to, foreign companies of the rights or privileges only accorded by state laws to domestic companies.—*Id.*

CONTRACT.

To share profits, when does not constitute partnership, see PARTNERSHIP, 1, 2.
Assignee of, may set up fraud, see FRAUD, 4.

1. The premises recited in a contract were that the plaintiff owned certain stock in a railroad; that it had been agreed that defendant should purchase of plaintiff one-half of his stock at a stated price and that it was desired that the parties should vote their stock as a unit and act in harmony in the management of the railroad. The contractual portion of the instrument recited that in consideration of the premises the parties agreed, first, that the plaintiff should sell and deliver to the defendants one-half of his stock at a certain price for which the defendants should give their note payable six months after date. The balance of the contract was covered by ten other paragraphs containing agreements for pooling and voting the stock, which arrangement was to continue for ten years, though no time was fixed for forming the pool. Held, in an action on the note, that the only consideration for the note was the delivery of the stock as provided in the first paragraph, which was complete in itself and independent of the others, and that the nonperformance of the further agreements was not a defense.—*Edgerton v. Power*, 350.
2. Where a contract for the sale of ewe sheep recited that the sheep were to be in "healthy condition" at the time of delivery, the fact that the vendor, prior to delivery, may have negligently permitted a number of the ewes to be bred, whereby they dropped their lambs at an unusual and inclement season of the year, to the loss of the vendee, does not constitute a breach of the contract, in the absence of evidence that the words had a local or peculiar signification, by which they were understood as a warranty that the ewes were not to be pregnant at the time of delivery.—*Olsen v. Port Huron L. S. Association*, 392.
3. Where defendant contracted to convey to plaintiff a one-fourth interest in a brick yard and works, with a provision that the plaintiff, at the expiration of one year might, if dissatisfied with the business, demand a return of the purchase price with one-fourth of the net profits and re-convey such interest, and shortly after the making of the contract the property is transferred, with the consent of both parties, to an incorporated company, the plaintiff receiving one-fourth of the capital stock, such transfer merged the original property into the company, and if a tender was necessary to plaintiff's right to rescind, a tender of the amount of stock received was all that defendant could require to put him in *statu quo*.—*Schutz v. O'Rourke*, 418.
4. A tender of stock representing an interest in property purchased under a contract reserving to the purchaser the right to rescind at the expiration of one year, is premature if made before the expiration of the year.—*Id.*
5. Where the vendee in a contract for the sale of an interest in a manufacturing plant reserved the right if dissatisfied with the business at the expiration of one year, to demand repayment of the purchase price and re-convey the interest acquired, and at the expiration of the year expressed such dissatisfaction, it then devolved upon the vendor to return the purchase price and upon the vendee in turn to re-convey the interest, and no formal tender of the stock representing the vendee's interest was necessary prior to the trial of an action to recover the purchase price.—*Id.*
6. Declarations in such case by the vendor, upon a demand being made after the expiration of the year, for the repayment of the purchase money, that he would settle when the vendee paid a part of a certain note, and at another time when approached for a settlement, that he would have nothing to do with it, constituted a waiver of the production of the stock and its formal tender.—*Id.*
7. Transfer by the plaintiff of a portion of the stock prior to the expiration of the year would not defeat a recovery of the purchase price, where a tender was made upon the trial of a certificate representing the full amount of the stock originally received. A return of the identical shares received was not essential.—*Id.*
8. The defendant having refused a tender of the stock on the trial solely upon the ground that it had been attached, will be held on appeal to have waived the objection that the stock tendered did not stand in plaintiff's name.—*Id.*

CONVENTIONS.

See ELECTIONS.

CONVERSION.

Statute of limitations begins to run from the time of sale of wife's property by husband.
 § 39. STATUTE OF LIMITATIONS, 1.

By mortgage of chattels, see CHATTEL MORTGAGES, 7, 8.

CORPORATIONS.

Alleged purchase of stock by, see ATTACHMENT, 1.

Action for penalty for failure to file annual report, when barred, see STATUTE OF LIMITATIONS, 2, 3.

1. One who is both the director and vice-president of a corporation and who, in the capacity of a superintendent, renders services of value to the company, which are clearly outside of the ordinary duties of a director or vice-president, and which some one had to perform, and which it was understood by the corporate officers were to be performed by such director and paid for as services of a superintendent, may recover therefor without an express contract. (*Felton v. West Iron Mountain Mining Co.*, 16 Mont. 81, affirmed.)—*Severson v. Bi Metallic Ex. M. & M. Co.*, 13.
2. Under the provisions of the Civil Code relating to the organization of domestic corporations (§ 390 *et seq.*), the issuance by the secretary of state of a certificate that a certified copy of the articles of incorporation of a company, organized thereunder, containing the required statement of facts, has been filed in his office, is a prerequisite to the legal formation of a domestic corporation.—*State ex rel. Travelers' Ins. Co. v. Rotwitt*, 87.
3. A foreign accident and life insurance company, wishing to do business within this state, is regulated by the provisions of sections 1030 *et seq.* of the Civil Code, requiring the filing with the secretary of state of a duly authenticated copy of its charter, together with a statement of its financial condition, and a certificate of consent to be sued, and is not within the requirement of subdivision 3, section 410 of the Political Code, that the secretary of state charge and collect for receiving and filing each certificate of incorporation the sum of fifty cents on each one thousand dollars of the capital stock of the company, since the certificate of incorporation referred to in this section pertains only to the certificate necessary to complete the legal organization of a domestic corporation. (*State ex rel. Aachen v. Munich Fire Insurance Co.*, 17 Mont. 41, cited.)—*Id.*
4. A foreign insurance company is not required to file a copy of its charter or articles of incorporation with the secretary of state, and where such company has fully complied with the statutory requirements relative to foreign insurance companies and has filed with the state auditor all papers required by the provisions of the Civil Code relating to stock and mutual insurance corporations (§§ 669, 670) it may compel the secretary of state by *mandamus* to file in his office a certificate designating an agent to receive process as required by section 1036 of the Civil Code. (*State ex rel. Aachen v. Munich Fire Insurance Co.*, 17 Mont. 41, cited.)—*State ex rel. Fidelity & Casualty Co. v. Rotwitt*, 92.
5. Under chapter 33, Fifth Division of the Compiled Statutes, providing for the organization of building and loan associations and authorizing a member to receive back the amount of subscriptions paid in by him upon withdrawing from the association, a complaint in an action by a member so withdrawing, to recover his subscriptions, which fails to allege that the defendant association was organized under the provisions of such chapter, is bad on general demurrer. (*Welsh v. Kemper*, 17 Mont. 491, cited.)—*Whitefoot v. National Fraternity B. & L. Ass'n*, 164.
6. In an action by a withdrawing member against a building and loan association to recover the amount of his subscriptions and interest where the statute authorizes repayment in such case of the amount of the subscription paid in, together with such interest as the by-laws may determine, the complaint, in order to support a recovery for interest, should state the rate of interest which the by-laws had determined.—*Id.*
7. A water company, organized under the statute for the purpose of supplying a city and its inhabitants with water, and having been granted a franchise for that purpose,

assumes obligations of a public nature and must exercise its powers in a reasonable manner, and therefore, where the inhabitant of a city occupying premises as a tenant, and requiring water for general purposes, but whose lessor had refused to be responsible for water rents, requests the company to turn on the water at his premises and tenders payment in advance, the refusal of the company to do so, under a rule not to supply water to rented premises except on the personal responsibility of the owner, and that if the water was turned on the money tendered would be credited to the owner is unreasonable.—*State ex rel. Milsted v. Buile Water Co.*, 199.

COSTS.

Attorneys fees in supreme court, not recoverable as, see MECHANIC'S LIENS, 3.

1. On motion to retax costs on remittitur from this court, an item for printing briefs, otherwise allowable, was properly stricken out where it appeared that this expense had been paid for in another item.—*Waite v. Vinnum*, 410.
2. An item in a cost bill reading: "To statement on appeal—\$100," was properly disallowed where it appeared that if intended as a charge for transcription, that expense had already been charged for, and if intended as a charge for professional services, was not a taxable item of costs.—*Id.*
3. Under section 494 of the Code of Civil Procedure (1887) allowing the prevailing party his "costs and necessary disbursements," a fee paid the stenographer for a transcript of the evidence to be used in preparing a statement on motion for a new trial is a necessary disbursement.—*Id.*

COUNTIES.

1. A loan of \$30,000 by a bank to a county, made in one day by splitting the sum loaned into several amounts of \$10,000 or less, each, is an attempted evasion of section 5, Article XII of the constitution, prohibiting a county from incurring an indebtedness for any single purpose to an amount exceeding \$10,000, without the approval of a majority of the electors thereof voting at an election for that purpose; and a bond issue to fund the indebtedness so created, together with other legal warrants, is void.—*Hoffman v. Commissioners of Gallatin County*, 224.
2. A complaint in an action to enjoin the issuance of bonds by a county, which alleges, in effect, that the board of county commissioners pretended to borrow a certain sum from a bank at one time and in four several amounts, issuing warrants therefor, in order to create an apparent warrant indebtedness of the county; that the amounts were treated as loans for which the bank filed its claims; that at the time of the issuance of the pretended warrants there was no money due said bank, but that it was then agreed between the county and the bank that said warrants represented only a pretended loan deposited to the credit of the county and which should not be drawn against unless a sufficient amount of bonds were sold to take up said warrants; that upon the second day after the allowance of the claims the commissioners made an order for the issuance of bonds to fund the outstanding warrant indebtedness and for the publication of notice thereof; that the question of issuing the bonds was never submitted to the electors and that they were not issued to redeem outstanding bonds, states a cause of action.—*Id.*
3. Where the answer in such case admitted the making of the agreement pleaded in the complaint, but averred that it was abandoned prior to the commencement of the action, this is an admission that such an agreement was in force when the warrants were drawn, and a denial that the board of commissioners at any time created any fictitious indebtedness is inconsistent therewith and evasive. (*Pencer v. Gum*, 6 Mont. 5; *Stewart v. Budd*, 7 Mont. 573; *State v. Dickerman*, 16 Mont. 278, cited.)—*Id.* The complaint in such case having charged a pretended loan for \$30,000, and that the warrants were issued as the basis for a bond issue with which to fund the loan, judgment on the pleadings was proper, where the answer identified the warrants as described in the complaint, but failed to specifically deny that the whole transaction was a loan of \$30,000, and that it was the sums making up that amount which, added

to the legal outstanding warrants, made up the total indebtedness alleged in the answer.—*Id.*

5. Where county commissioners undertake to incur an indebtedness against the county which is unconstitutional, this is not an exercise of administrative discretion in a matter within their jurisdiction, requiring a review by appeal under section 764, Fifth Division of the Compiled Statutes providing that any one aggrieved by the action of the commissioners may appeal to the district court, but it is a void act which may be restrained by injunction.—*Id.*
6. An injunction to restrain a bond issue for the purpose of funding warrants illegally issued will not be denied for want of diligence where the warrants were issued March 15th and the action was commenced May 28th and before the delivery of the bonds.—*Id.*
7. In an action by taxpayers against the board of commissioners to enjoin the delivery of bonds illegally issued and sold, the banks which had purchased the warrants and bonds are not necessary parties defendant.—*Id.*
8. An action to enjoin the delivery by the county commissioners of bonds illegally issued and sold, and to have the proceedings of the board declared void, is properly brought in the name of the plaintiffs as taxpayers. (*Davenport v. Kleinschmidt*, 6 Mont. 502, cited.)—*Id.*
9. Where the county treasurer is made a party defendant in such action with the commissioners and defaults, the commissioners cannot, on appeal, complain of the judgment rendered against him from which no appeal was taken.—*Id.*

COUNTY ASSESSOR.

1. Section 1790, Fifth Division of the Compiled Statutes (1887) making it the duty of the county assessor to collect the poor tax, providing for the manner of collection and creating a liability on the officer's official bond for the money so collected was a law of the territory upon the admission of the state and had not been repealed by prior amendatory and repealing acts.—*Commissioners of Meagher County v. Gardner*, 110.
2. Where a former statute providing for the collection of poor taxes by the county assessor also provided that he should be liable on his official bond for the money so collected, was practically reenacted in a subsequent act, with the exception of the provision in respect to liability on his bond, this omission does not release his official sureties from liability for taxes collected and embezzled by him subsequent to such reenactment, where the condition of the bond was that the assessor would pay over all moneys coming into his hands as such officer.—*Id.*
3. Sureties upon the official bond of a county assessor, upon whom was imposed by statute the duty of collecting poor taxes, and whose bond was conditioned that he would pay over the moneys so collected, are estopped from contending that the statute imposing such duty is in conflict with section 5, Article VI of the constitution, which provides that the county treasurer shall be collector of taxes.—*Id.*

COUNTY COMMISSIONERS.

See COUNTIES.

CREDITOR'S BILL.

1. A complaint in equity to reach and have applied to a judgment, property of the judgment debtor, alleged to be fraudulently concealed, which shows that there is no property subject to execution and what has become of it, need not also allege as a prerequisite to equitable relief, that an execution was issued and returned unsatisfied.—*Ryan v. Speth*, 45.
2. A creditor's bill to reach funds of an estate, alleged to have been fraudulently secreted and to require the administrator to personally account therefor in equity, need not allege that the plaintiff's claim was first presented to the administrator for allowance under the rules of probate practice.—*Id.*

3. The plaintiff in a creditor's suit must allege that he is the owner of the judgment and that it is unsatisfied.—*Id.*

CRIMINAL LAW.

Review on appeal from judgment, see *APPEAL*, 1, 2.

Misconduct of jurors as ground for new trial, see *NEW TRIAL*, 1.

Newly discovered evidence as ground for new trial, see *NEW TRIAL*, 2, 3.

Remarks of counsel in argument, see *APPEAL*, 7.

1. It is error to allow the prosecuting attorney, for the purpose of impeachment, to testify as to what a witness to the homicide stated at the coroner's inquest, by repeating her statements as taken down in writing by him at the time and stating that she had so stated, where the statements concerning which she was to be impeached had not been first related to her with an opportunity to answer as to their truth or to explain them, nor the written evidence shown to her before putting the questions, as required by section 3380 of the Code of Civil Procedure.—*State v. O'Brien*, 1.
2. On a trial for murder, where the killing occurred in the defendant's house, the relations existing between the defendant and a woman with whom he was living may be proved by the state as bearing upon the defendant's motives, and as to whether under all the circumstances he acted as a reasonable man.—*Id.*
3. The state should not be permitted to introduce statements by the defendant before the coroner immediately after the homicide, made in ignorance of his lawful rights, without the aid of counsel and under the belief that he was obliged to answer the questions put to him.—*Id.*
4. Continual objections by the counsel for the state to questions asked the witnesses for the defense, many without merit, and made for the purpose of keeping a knowledge of the case or its merits from the jury, is improper practice.—*Id.*
5. An instruction as to reasonable doubt, that, if the jury, "or any one of them," entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, the defendant should be given the benefit of the doubt and acquitted, is objectionable in implying that if one jurymen has a reasonable doubt the eleven must concur in acquittal.—*Id.*
6. The general doctrine of the right of a man to defend himself, if assailed in his own house, is that he need retreat no further.—*Id.*
7. Under section 4636, Penal Code, restricting the state and defendant each to six witnesses, except upon order of the court upon proper showing by affidavit or otherwise, it is proper for the court to require the defendant, upon a request for a subpoena for additional witnesses, to disclose the materiality of their testimony.—*Id.*
8. On a trial for murder, evidence that prior to the killing the defendant had litigation or trouble about his land, which was offered for the purpose of showing the beginning of the trouble and the sentiment worked up against the defendant, was properly excluded until it might become relevant by connecting the deceased therewith; or until it was shown to relate to some circumstance that extenuated the killing.—*State v. Gay*, 51.
9. On a trial for murder evidence offered by the defense that some person, not a witness in the case, had burned the defendant's house some days before the homicide, was properly excluded as irrelevant where it did not appear that the deceased had participated in the burning.—*Id.*
10. Where the jury were instructed upon the distinguishing features of the several degrees of murder and manslaughter as defined by the statute, and as to the penalty for murder in the first degree, the omission of the court to also inform the jury as to the penalties for murder in the second degree and manslaughter was not prejudicial to the defendant, where no instruction defining such penalties was requested by the defendant and the jury found him guilty of murder in the first degree. (*State v. Baker*, 13 Mont 160, cited.)—*Id.*
11. The jury being the sole judges of the weight to be given to the testimony, an instruction offered by the defense that dying declarations should be received with great caution, was properly refused as commenting on the weight to be given to that par-

ticular portion of the testimony. (*State v. Gleim*, 17 Mont. 17; *Wastl v. Montana Union Ry. Co.*, 17 Mont. 218, cited.)—*Id.*

12. The court not being required by section 2070 of the Penal Code, to give an instruction in any modified form, a party offering an erroneous instruction cannot complain that it was not corrected and then given.—*Id.*
13. Statements by the deceased just after being shot, and while rational, that he knew his wound was fatal; that he could not recover; that he would never see his home again and that the defendant had shot him, are admissible as dying declarations, it appearing that he expressed no belief in his recovery at any time, and that a doctor had told him that all he could do was to alleviate the pain. (*State v. Russell*, 13 Mont. 164, cited.)—*Id.*
14. Evidence that the defendant had aided another to escape from arrest and had left in his company threatening to kill any one who attempted to arrest him; that prior to the homicide both had resisted the officers on several occasions; that while being pursued his companion killed an officer, whose official character was well known to both, and whom defendant had himself threatened to kill, although the officer after exchanging some shots with him had commanded them to surrender and said he would shoot no more; that defendant shot another officer immediately upon the latter discovering him in hiding; that the deceased in his dying declaration said that defendant had shot him; that defendant after shooting the deceased shot at another officer; that defendant was at no time fired upon until he had first drawn his gun or was fleeing to elude them,—is sufficient to sustain a conviction of murder in the first degree.—*Id.*
15. Where one who had committed a felony and had shown a disposition not to submit to arrest aimed a rifle at an officer, whom he well knew officially, and prepared to shoot him when commanded to stop and throw up his hands, it was not necessary to justify the attempted arrest that the officer should have first disclosed his official character and the reason for the arrest.

DAMAGES.

For unlawful construction of water ditch, see WATER RIGHTS, 5.

For obstructing ditch, see NEW TRIAL, 7.

DEEDS.

Action to reform, parties in, see HOMESTEAD, 2.

DISTRICT COURT.

The jurisdiction of the district court, sitting in probate matters is limited to the powers conferred upon it by statute. (*In re Higgins' Estate*, 15 Mont. 474; *Chadwick v. Chadwick*, 6 Mont. 566, cited.)—*State ex rel. Bartlett v. Second Judicial District Court*, 481.

DURESS.

Defense of, to action on note, see NEGOTIABLE INSTRUMENTS, 3, 4, 5, 6.

EJECTMENT.

Prior possession of land afterwards in railroad grant, see RAILROADS, 1.

Adverse possession of lands for the period of the statute of limitations will not be defeated because defendant's entry was not made under a paper title. (*National Mining Co. v. Powers*, 3 Mont. 344, cited.)—*Minnesota Land & Improvement Co. v. Braster*, 444.

ELECTIONS.

1. An election contest authorized by section 1043, Fifth Division of the Compiled Statutes, being a special proceeding, the jurisdictional facts must appear on the face of

the proceedings, and therefore where the statute permits a contest to be instituted only by an elector, the omission of the contestant to show by averment on the face of the record that he is an elector, is fatal.—*Gillespie v. Dion*, 183.

2. In an election contest instituted under section 1043, Fifth Division of the Compiled Statutes, where the contestant's statement failed to state a jurisdictional fact, no amendment offered or made after the lapse of the ten days allowed by the statute for instituting the contest could cure the defect or give the court jurisdiction to act.—*Id.*
3. Under section 1043, Fifth Division of the Compiled Statutes, requiring the contestant of an election to file, within ten days thereafter, a statement specifying the grounds of contest, a statement merely alleging that marked ballots were voted and counted in a certain precinct, and that owing to confusion at the time the votes were counted, mistakes were made, and which failed to state that the contestant was a candidate for the office in question, or that any one of the ballots were unlawfully marked, or the nature of the alleged mistakes, or that they affected the result, or the number of votes cast at that precinct, or that any electors were prevented from voting by fraud or other misconduct, is insufficient. A statement so defective cannot be cured by amendment after the time allowed by law for commencing proceedings has expired. (*Heyfron v. Mahoney*, 9 Mont. 437, cited.)—*Id.*
4. Sections 1200, 1209, 1211, 1212, 1218 to 1221, inclusive and 1224 to 1234 inclusive of chapter 3, Part III, title II of the Political Code, pertaining to the registration of voters, held in force.—*Steele v. Gilpatrick*, 453.
5. The time for opening registration offices is controlled by the provisions of section 1227, chapter 3, Part III, title II of the Political Code, and the registration of electors, as therein provided, may not lawfully begin before the second Tuesday of October preceding any general election.—*Id.*
6. Section 1283, *Id.*, prohibiting registration and voting in any county other than the one in which the elector actually resides at the time of his registration or in which he will have actually resided for thirty days before election day, is controlling as to the character of registration certificates permitted to be issued by registry agents.—*Id.*
7. Where a judicial district comprises two counties the nomination of a candidate for district judge by a political party at a county convention composed of delegates of that county alone, without the other county having an opportunity to participate in the proceedings is a nullity.—*State ex rel. Woody v. Rotwelt*, 502.
8. The conventions and primary meetings provided for by sections 1310, 1311, 1312 of the Political Code, held for the purpose of nominating candidates for public office, are meant to be organized assemblages of electors or delegates fairly representing the entire body of electors of the political party which may lawfully vote for the candidates of an such convention.—*Id.*
9. Section 1313 of the Political Code, permitting a candidate for public office to be nominated by certificate or petition signed by a certain percentage of the electors residing within the political division for which the officer is to be elected, contemplates simply the candidacy of one not a nominee of a party, as an independent or electors' candidate, and where no effective nomination for a particular office has been made by any convention or primary meeting held by the delegates of an organized political party for the purpose of nominating a candidate for that office, a person is not entitled to have his name placed upon the regular party ticket as a nominee for the office solely by petition of voters who nominate him as the candidate of such regularly organized party. In such case he is simply the candidate of those individual electors who have joined in nominating him and is only entitled to be placed upon the ballot as such a candidate.—*Id.*
10. A list of persons cannot be placed upon the official ballot as candidates of a so-called Silver Republican party upon a petition filed with the county clerk nominating such persons for their respective offices as candidates of such party. (*State ex rel. Woody v. Rotwelt*, ante, cited.)—*State ex rel. Russell v. Tooker*, 540.
11. The nomination of a list of persons as candidates of a so-called Silver Republican party by a certificate filed with the county clerk purporting to certify their nomination as by the central committee of the Silver Republican party is ineffectual where

no convention held by such party had ever delegated this power to a committee. (*State ex rel. Pigott v. Benton*, 13 Mont. 306, cited.)—*Id.*

12. A certificate purporting upon its face to be that of a county convention of the Silver Republican party and nominating a county ticket composed of Republicans, Silver Republicans, Democrats and Populists, is insufficient to authorize the placing of their names upon the official ballot, where it appeared that the nominations were in fact made at a meeting of some fifty members of a Silver Republican club having four hundred members; that the officers signing the certificates were the presiding officer and secretary of the club; that no primaries were ever held; no call for a convention ever made; nor any person ever elected as a delegate to a convention, or notice given that a convention was to be held,—since such proceedings were not those of an organized assemblage of delegates representing a political party within the meaning of section 1810 of the Political Code.—*Id.*
13. The nomination of a county ticket and presidential electors by a so-called Citizens Silver party convention is a nullity where the convention was participated in by twenty-one electors of the county who appeared in response to personal invitation and after acting as a county convention then proceeded to hold a state convention, it appearing that no call for a state convention was ever given or delegates elected to either convention, or notice published throughout the state or county of the gathering of the new party. (*State ex rel. Woody, v. Rotwill*, ante, page 502, affirmed.)—*State ex rel. Metcalf v. Johnson*, 548.
14. Where a regular Republican county convention, after completing its business adjourns *sine die*, and a portion of the members of the convention, including the presiding officer and secretary, then re-assemble as a county convention of the Silver Republican party, which was a regularly organized political party in the state, without any call having been issued for, or any delegates elected to, such convention, its proceedings are illegal and void. (*State ex rel. Metcalf v. Johnson*, ante, 548, cited.)—*State ex rel. McLaughlin v. Bailey*, 554.
15. Where the regularly elected delegates to a republican county convention upon assembling were unable to agree on an organization, whereupon a portion of the delegates withdrew and assembling at another place, nominated a county ticket and adopted the name of the Silver Republican party, but without any intention of forming a new party, but for the purpose of designating the party for and as a principle only, and to prevent confusion in the identity of the two tickets the court will not interfere at the instance of one faction to restrain the county clerk from placing on the official ballot the ticket nominated by the other faction. Such a contention in the ranks of regularly elected delegates will be left to the electors to determine.—*State ex rel. Gillis v. Johnson*, 553.
16. The nomination of a person for an office as the candidate of a regularly organized party, as the Silver Republican party, cannot be made by petition although the petition was signed only by members of that party and was filed by direction of the state and county central committees of the district. Nor would such nomination be entitled to appear on the ballot in a separate column as the electors Silver Republican candidate, or as an independent nomination. (*State ex rel. Woody v. Rotwill*, ante, page 502, cited.)—*State ex rel. Matt v. Reek*, 557.
17. An application to this court for an injunction to restrain a county clerk from placing certain names upon the official ballot, which involves a contention between two rival conventions of a political party, each claiming to be the only regular convention of that party and nominating candidates for the same county offices, and each being composed of delegates as to whom there was a showing that they were elected from the body of the electors of the county, will be dismissed for laches where the application which might have been made ten days earlier, was delayed until a time which left only a few hours for the consideration of important questions presented.—*State ex rel. Stigh v. Reek*, 561.

EMINENT DOMAIN.

Does not give right of way for ditch without condemnation proceedings, see WATER RIGHTS, 4.

Bank aforesaid for \$1,500, kept in Nelhart and on road freighting, more particularly described as follows,"—is sufficient not only as between the parties to the mortgage but as to third parties as well, without a more specific description being added after the words "as follows."—*Id.*

5. The insertion in a chattel mortgage of a more particular description of the property, made by the mortgagee's attorney after the mortgage had been executed and acknowledged by the mortgagors, but with their express consent, does not render the mortgage void as against third parties where no rights intervened, and the description as given at the time of execution of the mortgage was sufficient without further particularization.—*Id.*
6. A creditor whose debt is secured by a mortgage has no right to proceed against his debtor's property by attachment until his mortgage security has been exhausted by foreclosure, but the fact that an attachment is issued under such circumstances does not operate as a waiver of the mortgage lien in the absence of the facts creating an estoppel. (*Larvey v. Chapman, ante*, page 563, cited.)—*Id.*
7. Where a creditor holding a chattel mortgage upon a stock of merchandise, upon which there is a prior mortgage and also several mortgages subsequent to his, deposits the amount of the prior mortgage with the county treasurer as permitted by statute, and, disregarding the subsequent mortgages which were valid liens, attaches the property and sells it under execution, he and the sheriff are trespassers and liable to the subsequent mortgagees for the value of the property so converted in excess of the amount of his own mortgage.—*Id.*
8. A motion for rehearing in such case made upon the ground that the value of the property sold under the defendant's execution was stipulated on the trial to be \$12,500, and for that reason a new trial for the purpose of determining the value of the property converted was unnecessary, will be denied where it appeared from the record that the court struck out the defendant's allegations raising an issue as to the value, rendering proof upon that point immaterial, and it seemed that the stipulation was made for the purpose of the trial as the court viewed the issues to be tried.—*Id.*

CITY ORDINANCE.

A complaint for vagrancy under a city ordinance should not be dismissed because the charging part of the complaint concludes with scandalous matter, but such matter should be stricken out where the complaint, independently of the objectionable matter, sufficiently sets forth the offense.—*City of Butte v. Peasley*, 303.

CLAIM AND DELIVERY.

See REPLEVIN.

CONSTITUTIONAL LAW.

Limit of indebtedness by counties, see COUNTIES, 1.

Power of board of equalization to raise valuation, see TAXATION, 2.

1. The Code of Civil Procedure of 1896 (§3265) making a malicious and guilty intent a conclusive presumption from the deliberate commission of an unlawful act for the purpose of injuring another, is not *ex post facto* as to a homicide committed prior to its adoption, in that it changes the rules of evidence and declares a force to evidence greater than that existing under the former statute (§ 19, Fourth Division of the Compiled Statutes) defining express malice to be "that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof," since express malice is composed of the same elements of fact in each statute, all of which must be proved by competent evidence beyond a reasonable doubt, and each of which is rebuttable.—*State v. Gay*, 51.
2. Section 1235 of the Code of Civil Procedure of 1896, allowing judgment debtors one year in which to redeem, is applicable to a decretal sale of mortgaged premises thereafter made although at the time the mortgage was given the period of redemption was six months. Such extension of the period for redemption does not impair

the obligation of the contract between the mortgagor and the mortgagee when the latter becomes the purchaser, because by purchasing his character as mortgagee ceases and he necessarily subjects himself to the law then in force defining the rights of purchasers. Nor is the obligation of the contract impaired by the fact that such extension may tend to reduce the number and amount of bids at the foreclosure sale, for such contingencies are too remote to justify the conclusion that such legislation affected the value of the mortgage contract.—*State ex rel. Thomas Cruise Sav. Bank v. Gilliam*, 94.

3. Sureties upon the official bond of a county assessor, upon whom was imposed by statute the duty of collecting poor taxes, and whose bond was conditioned that he would pay over the moneys so collected, are estopped from contending that the statute imposing such duty is in conflict with section 5, Article VI of the constitution, which provides that the county treasurer shall be collector of taxes.—*Commissioners of Meagher Co. v. Gardner*, 110.
4. The legislature has full power to enact a license law unless it is forbidden by the constitution.—*State v. Camp Sing*, 128.
5. In construing a constitutional provision the proceedings and debates of the framers of the constitution may be examined as tending to show what its terms were understood to designate and include.—*Id.*
6. A constitutional provision should not be so construed as to nullify a law unless it is clear that such a construction was intended.—*Id.*
7. The word "also" in the last sentence of section 1, article XII of the constitution, providing that "The legislative assembly may also impose a license tax both upon persons and upon corporations doing business in the state," which follows the provision that the revenue for the support of the state shall be provided for by taxes, was not used to carry over into the sentence where it occurs the idea expressed in the sentence preceding it, to the effect that the legislature may also impose license taxes for the support of the state, but was used simply to connect the idea of the two systems of revenue, and therefore the imposing of license taxes is not restricted to the purposes of state revenue alone.—*Id.*
8. A license tax is not within the inhibition of the constitution (§ 4, Article XII) that the legislative assembly shall not levy taxes upon the inhabitants or property in any county, city or town, or municipal corporation, for county, town or municipal purposes, but it may by law vest in the corporate authorities thereof powers to assess and collect taxes for such purposes. The intent of this section and section 1, *Id.*, to refer to taxation proper, and not to licenses, is expressed in the use of the words "levy," "assess," and "rate," when speaking of taxes, and the use of the word "impose," when speaking of licenses.—*Id.*
9. The laundry license tax law (Political Code, §§ 4079 *et seq.*) which allows seventy per cent. of the licenses to be retained by the county, is not repugnant to section 4, article XII of the constitution, as levying a tax upon the inhabitants or property in a county for county purposes.—*Id.*
10. Section 697, Fifth Division of the Compiled Statutes, declaring the liability of the corporation to an employe injured through the negligence of his superior to be the same as if the employe were a passenger, being originally part of an act for the incorporation of railroad companies in the territory, and having application only to corporations created under such act, imposes upon domestic railroad companies a burden not imposed upon foreign railroad companies operating within the state and was therefore annulled by the adoption of the state constitution, in which (§ 1, Article XV) foreign corporations are prohibited from enjoying within the state any greater privileges than enjoyed by like corporations created under the laws of the state.—*Crittwell v. Montana Central Ry.*, 167.
11. Section 11, Article XV of the constitution, declaring in effect that domestic corporations shall not be discriminated against in the enjoyment or possession of rights and privileges that may be accorded to foreign corporations of like character, is self executing as a prohibition, but not as an affirmative imposition upon, or securement to, foreign companies of the rights or privileges only accorded by state laws to domestic companies.—*Id.*

CONTRACT.

To share profits, when does not constitute partnership, see PARTNERSHIP, 1, 2.
Assignee of, may set up fraud, see FRAUD, 4.

1. The premises recited in a contract were that the plaintiff owned certain stock in a railroad; that it had been agreed that defendant should purchase of plaintiff one-half of his stock at a stated price and that it was desired that the parties should vote their stock as a unit and act in harmony in the management of the railroad. The contractual portion of the instrument recited that in consideration of the premises the parties agreed, first, that the plaintiff should sell and deliver to the defendants one-half of his stock at a certain price for which the defendants should give their note payable six months after date. The balance of the contract was covered by ten other paragraphs containing agreements for pooling and voting the stock, which arrangement was to continue for ten years, though no time was fixed for forming the pool. Held, in an action on the note, that the only consideration for the note was the delivery of the stock as provided in the first paragraph, which was complete in itself and independent of the others, and that the nonperformance of the further agreements was not a defense.—*Edgerton v. Power*, 350.
2. Where a contract for the sale of ewe sheep recited that the sheep were to be in "healthy condition" at the time of delivery, the fact that the vendor, prior to delivery, may have negligently permitted a number of the ewes to be bred, whereby they dropped their lambs at an unusual and inclement season of the year, to the loss of the vendee, does not constitute a breach of the contract, in the absence of evidence that the words had a local or peculiar signification, by which they were understood as a warranty that the ewes were not to be pregnant at the time of delivery.—*Olsen v. Port Huron L. S. Association*, 392.
3. Where defendant contracted to convey to plaintiff a one-fourth interest in a brick yard and works, with a provision that the plaintiff, at the expiration of one year might, if dissatisfied with the business, demand a return of the purchase price with one-fourth of the net profits and re-convey such interest, and shortly after the making of the contract the property is transferred, with the consent of both parties, to an incorporated company, the plaintiff receiving one-fourth of the capital stock, such transfer merged the original property into the company, and if a tender was necessary to plaintiff's right to rescind, a tender of the amount of stock received was all that defendant could require to put him in *status quo*.—*Schutz v. O'Rourke*, 418.
4. A tender of stock representing an interest in property purchased under a contract reserving to the purchaser the right to rescind at the expiration of one year, is premature if made before the expiration of the year.—*Id.*
5. Where the vendee in a contract for the sale of an interest in a manufacturing plant reserved the right if dissatisfied with the business at the expiration of one year, to demand repayment of the purchase price and re-convey the interest acquired, and at the expiration of the year expressed such dissatisfaction, it then devolved upon the vendor to return the purchase price and upon the vendee in turn to re-convey the interest, and no formal tender of the stock representing the vendee's interest was necessary prior to the trial of an action to recover the purchase price.—*Id.*
6. Declarations in such case by the vendor, upon a demand being made after the expiration of the year, for the repayment of the purchase money, that he would settle when the vendee paid a part of a certain note, and at another time when approached for a settlement, that he would have nothing to do with it, constituted a waiver of the production of the stock and its formal tender.—*Id.*
7. Transfer by the plaintiff of a portion of the stock prior to the expiration of the year would not defeat a recovery of the purchase price, where a tender was made upon the trial of a certificate representing the full amount of the stock originally received. A return of the identical shares received was not essential.—*Id.*
8. The defendant having refused a tender of the stock on the trial solely upon the ground that it had been attached, will be held on appeal to have waived the objection that the stock tendered did not stand in plaintiff's name.—*Id.*

CONVENTIONS.

See ELECTIONS.

CONVERSION.

Statute of limitations begins to run from the time of sale of wife's property by husband, see STATUTE OF LIMITATIONS, 1.

By mortgagee of chattels, see CHATTEL MORTGAGES, 7, 8.

CORPORATIONS.

Alleged purchase of stock by, see ATTACHMENT, 1.

Action for penalty for failure to file annual report, when barred, see STATUTE OF LIMITATIONS, 2, 3.

1. One who is both the director and vice-president of a corporation and who, in the capacity of a superintendent, renders services of value to the company, which are clearly outside of the ordinary duties of a director or vice-president, and which some one had to perform, and which it was understood by the corporate officers were to be performed by such director and paid for as services of a superintendent, may recover therefor without an express contract. (*Fellon v. West Iron Mountain Mining Co.*, 16 Mont. 81, affirmed.)—*Severson v. Bt Metallic Ex. M. & M. Co.*, 13.
2. Under the provisions of the Civil Code relating to the organization of domestic corporations (§ 390 *et seq.*), the issuance by the secretary of state of a certificate that a certified copy of the articles of incorporation of a company, organized thereunder, containing the required statement of facts, has been filed in his office, is a prerequisite to the legal formation of a domestic corporation.—*State ex rel. Travelers' Ins. Co. v. Rotwitt*, 87.
3. A foreign accident and life insurance company, wishing to do business within this state, is regulated by the provisions of sections 1690 *et seq.* of the Civil Code, requiring the filing with the secretary of state of a duly authenticated copy of its charter, together with a statement of its financial condition, and a certificate of consent to be sued, and is not within the requirement of subdivision 3, section 410 of the Political Code, that the secretary of state charge and collect for receiving and filing each certificate of incorporation the sum of fifty cents on each one thousand dollars of the capital stock of the company, since the certificate of incorporation referred to in this section pertains only to the certificate necessary to complete the legal organization of a domestic corporation. (*State ex rel. Aachen v. Munich Fire Insurance Co.*, 17 Mont. 41, cited.)—*Id.*
4. A foreign insurance company is not required to file a copy of its charter or articles of incorporation with the secretary of state, and where such company has fully complied with the statutory requirements relative to foreign insurance companies and has filed with the state auditor all papers required by the provisions of the Civil Code relating to stock and mutual insurance corporations (§§ 669, 670) it may compel the secretary of state by *mandamus* to file in his office a certificate designating an agent to receive process as required by section 1036 of the Civil Code. (*State ex rel. Aachen v. Munich Fire Insurance Co.*, 17 Mont. 41, cited.)—*State ex rel. Fidelity & Casualty Co. v. Rotwitt*, 92.
5. Under chapter 39, Fifth Division of the Compiled Statutes, providing for the organization of building and loan associations and authorizing a member to receive back the amount of subscriptions paid in by him upon withdrawing from the association, a complaint in an action by a member so withdrawing, to recover his subscriptions, which fails to allege that the defendant association was organized under the provisions of such chapter, is bad on general demurrer. (*Wetthey v. Kemper*, 17 Mont. 491, cited.)—*Whitefoot v. National Fraternity B. & L. Ass'n*, 164.
6. In an action by a withdrawing member against a building and loan association to recover the amount of his subscriptions and interest where the statute authorizes repayment in such case of the amount of the subscription paid in, together with such interest as the by-laws may determine, the complaint, in order to support a recovery for interest, should state the rate of interest which the by-laws had determined.—*Id.*
7. A water company, organized under the statute for the purpose of supplying a city and its inhabitants with water, and having been granted a franchise for that purpose,

assumes obligations of a public nature and must exercise its powers in a reasonable manner, and therefore, where the inhabitant of a city occupying premises as a tenant, and requiring water for general purposes, but whose lessor had refused to be responsible for water rents, requests the company to turn on the water at his premises and tenders payment in advance, the refusal of the company to do so, under a rule not to supply water to rented premises except on the personal responsibility of the owner, and that if the water was turned on the money tendered would be credited to the owner is unreasonable.—*State ex rel. Milled v. Butte Water Co.*, 199.

COSTS.

Attorneys fees in supreme court, not recoverable as, see *MECHANIC'S LIENS*, 3.

1. On motion to retax costs on remittitur from this court, an item for printing briefs, otherwise allowable, was properly stricken out where it appeared that this expense had been paid for in another item.—*Waite v. Vinson*, 410.
2. An item in a cost bill reading: "To statement on appeal—\$100," was properly disallowed where it appeared that if intended as a charge for transcription, that expense had already been charged for, and if intended as a charge for professional services, was not a taxable item of costs.—*Id.*
3. Under section 494 of the Code of Civil Procedure (1887) allowing the prevailing party his "costs and necessary disbursements," a fee paid the stenographer for a transcript of the evidence to be used in preparing a statement on motion for a new trial is a necessary disbursement.—*Id.*

COUNTIES.

1. A loan of \$30,000 by a bank to a county, made in one day by splitting the sum loaned into several amounts of \$10,000 or less, each, is an attempted evasion of section 5, Article XII of the constitution, prohibiting a county from incurring an indebtedness for any single purpose to an amount exceeding \$10,000, without the approval of a majority of the electors thereof voting at an election for that purpose; and a bond issue to fund the indebtedness so created, together with other legal warrants, is void.—*Hoffman v. Commissioners of Gallatin County*, 224.
 2. A complaint in an action to enjoin the issuance of bonds by a county, which alleges, in effect, that the board of county commissioners pretended to borrow a certain sum from a bank at one time and in four several amounts, issuing warrants therefor, in order to create an apparent warrant indebtedness of the county; that the amounts were treated as loans for which the bank filed its claims; that at the time of the issuance of the pretended warrants there was no money due said bank, but that it was then agreed between the county and the bank that said warrants represented only a pretended loan deposited to the credit of the county and which should not be drawn against unless a sufficient amount of bonds were sold to take up said warrants; that upon the second day after the allowance of the claims the commissioners made an order for the issuance of bonds to fund the outstanding warrant indebtedness and for the publication of notice thereof; that the question of issuing the bonds was never submitted to the electors and that they were not issued to redeem outstanding bonds, states a cause of action.—*Id.*
 3. Where the answer in such case admitted the making of the agreement pleaded in the complaint, but averred that it was abandoned prior to the commencement of the action, this is an admission that such an agreement was in force when the warrants were drawn, and a denial that the board of commissioners at any time created any fictitious indebtedness is inconsistent therewith and evasive. (*Pruce v. Gem*, 6 Mont. 5; *Stewart v. Budd*, 7 Mont. 573; *State v. Dickerman*, 18 Mont. 278, cited.)—*Id.*
- The complaint in such case having charged a pretended loan for \$30,000, and that the warrants were issued as the basis for a bond issue with which to fund the loan, judgment on the pleadings was proper, where the answer identified the warrants as described in the complaint, but failed to specifically deny that the whole transaction was a loan of \$30,000, and that it was the sums making up that amount which, added

to the legal outstanding warrants, made up the total indebtedness alleged in the answer.—*Id.*

5. Where county commissioners undertake to incur an indebtedness against the county which is unconstitutional, this is not an exercise of administrative discretion in a matter within their jurisdiction, requiring a review by appeal under section 764, Fifth Division of the Compiled Statutes providing that any one aggrieved by the action of the commissioners may appeal to the district court, but it is a void act which may be restrained by injunction.—*Id.*
6. An injunction to restrain a bond issue for the purpose of funding warrants illegally issued will not be denied for want of diligence where the warrants were issued March 15th and the action was commenced May 28th and before the delivery of the bonds.—*Id.*
7. In an action by taxpayers against the board of commissioners to enjoin the delivery of bonds illegally issued and sold, the banks which had purchased the warrants and bonds are not necessary parties defendant.—*Id.*
8. An action to enjoin the delivery by the county commissioners of bonds illegally issued and sold, and to have the proceedings of the board declared void, is properly brought in the name of the plaintiffs as taxpayers. (*Davenport v. Kleinschmidt*, 6 Mont. 502, cited.)—*Id.*
9. Where the county treasurer is made a party defendant in such action with the commissioners and defaults, the commissioners cannot, on appeal, complain of the judgment rendered against him from which no appeal was taken.—*Id.*

COUNTY ASSESSOR.

1. Section 1790, Fifth Division of the Compiled Statutes (1887) making it the duty of the county assessor to collect the poor tax, providing for the manner of collection and creating a liability on the officer's official bond for the money so collected was a law of the territory upon the admission of the state and had not been repealed by prior amendatory and repealing acts.—*Commissioners of Meigher County v. Gardner*, 110.
2. Where a former statute providing for the collection of poor taxes by the county assessor also provided that he should be liable on his official bond for the money so collected, was practically reenacted in a subsequent act, with the exception of the provision in respect to liability on his bond, this omission does not release his official sureties from liability for taxes collected and embezzled by him subsequent to such reenactment, where the condition of the bond was that the assessor would pay over all moneys coming into his hands as such officer.—*Id.*
3. Sureties upon the official bond of a county assessor, upon whom was imposed by statute the duty of collecting poor taxes, and whose bond was conditioned that he would pay over the moneys so collected, are estopped from contending that the statute imposing such duty is in conflict with section 5, Article VI of the constitution, which provides that the county treasurer shall be collector of taxes.—*Id.*

COUNTY COMMISSIONERS.

See COUNTIES.

CREDITOR'S BILL.

1. A complaint in equity to reach and have applied to a judgment, property of the judgment debtor, alleged to be fraudulently concealed, which shows that there is no property subject to execution and what has become of it, need not also allege as a prerequisite to equitable relief, that an execution was issued and returned unsatisfied.—*Ryan v. Speth*, 45.
2. A creditor's bill to reach funds of an estate, alleged to have been fraudulently secreted and to require the administrator to personally account therefor in equity, need not allege that the plaintiff's claim was first presented to the administrator for allowance under the rules of probate practice.—*Id.*

3. The plaintiff in a creditor's suit must allege that he is the owner of the judgment and that it is unsatisfied.—*Id.*

CRIMINAL LAW.

Review on appeal from judgment, see *APPEAL*, 1, 2.

Misconduct of jurors as ground for new trial, see *NEW TRIAL*, 1.

Newly discovered evidence as ground for new trial, see *NEW TRIAL*, 2, 3.

Remarks of counsel in argument, see *APPEAL*, 7.

1. It is error to allow the prosecuting attorney, for the purpose of impeachment, to testify as to what a witness to the homicide stated at the coroner's inquest, by repeating her statements as taken down in writing by him at the time and stating that she had so stated, where the statements concerning which she was to be impeached had not been first related to her with an opportunity to answer as to their truth or to explain them, nor the written evidence shown to her before putting the questions, as required by section 3380 of the Code of Civil Procedure.—*State v. O'Brien*, 1.
2. On a trial for murder, where the killing occurred in the defendant's house, the relations existing between the defendant and a woman with whom he was living may be proved by the state as bearing upon the defendant's motives, and as to whether under all the circumstances he acted as a reasonable man.—*Id.*
3. The state should not be permitted to introduce statements by the defendant before the coroner immediately after the homicide, made in ignorance of his lawful rights, without the aid of counsel and under the belief that he was obliged to answer the questions put to him.—*Id.*
4. Continual objections by the counsel for the state to questions asked the witnesses for the defense, many without merit, and made for the purpose of keeping a knowledge of the case or its merits from the jury, is improper practice.—*Id.*
5. An instruction as to reasonable doubt, that, if the jury, "or any one of them," entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, the defendant should be given the benefit of the doubt and acquitted, is objectionable in implying that if one jurymen has a reasonable doubt the eleven must concur in acquittal.—*Id.*
6. The general doctrine of the right of a man to defend himself, if assailed in his own house, is that he need retreat no further.—*Id.*
7. Under section 4636, Penal Code, restricting the state and defendant each to six witnesses, except upon order of the court upon proper showing by affidavit or otherwise, it is proper for the court to require the defendant, upon a request for a subpoena for additional witnesses, to disclose the materiality of their testimony.—*Id.*
8. On a trial for murder, evidence that prior to the killing the defendant had litigation or trouble about his land, which was offered for the purpose of showing the beginning of the trouble and the sentiment worked up against the defendant, was properly excluded until it might become relevant by connecting the deceased therewith; or until it was shown to relate to some circumstance that extenuated the killing.—*State v. Gay*, 51.
9. On a trial for murder evidence offered by the defense that some person, not a witness in the case, had burned the defendant's house some days before the homicide, was properly excluded as irrelevant where it did not appear that the deceased had participated in the burning.—*Id.*
10. Where the jury were instructed upon the distinguishing features of the several degrees of murder and manslaughter as defined by the statute, and as to the penalty for murder in the first degree, the omission of the court to also inform the jury as to the penalties for murder in the second degree and manslaughter was not prejudicial to the defendant, where no instruction defining such penalties was requested by the defendant and the jury found him guilty of murder in the first degree. (*State v. Baker*, 18 Mont 160, cited.)—*Id.*
11. The jury being the sole judges of the weight to be given to the testimony, an instruction offered by the defense that dying declarations should be received with great caution, was properly refused as commenting on the weight to be given to that par-

ticular portion of the testimony. (*State v. Gleim*, 17 Mont. 17; *Wassl v. Montana Union Ry. Co.*, 17 Mont. 213, cited.)—*Id.*

12. The court not being required by section 2070 of the Penal Code, to give an instruction in any modified form, a party offering an erroneous instruction cannot complain that it was not corrected and then given.—*Id.*
13. Statements by the deceased just after being shot, and while rational, that he knew his wound was fatal; that he could not recover; that he would never see his home again and that the defendant had shot him, are admissible as dying declarations, it appearing that he expressed no belief in his recovery at any time, and that a doctor had told him that all he could do was to alleviate the pain. (*State v. Russell*, 13 Mont. 164, cited.)—*Id.*
14. Evidence that the defendant had aided another to escape from arrest and had left in his company threatening to kill any one who attempted to arrest him; that prior to the homicide both had resisted the officers on several occasions; that while being pursued his companion killed an officer, whose official character was well known to both, and whom defendant had himself threatened to kill, although the officer after exchanging some shots with him had commanded them to surrender and said he would shoot no more; that defendant shot another officer immediately upon the latter discovering him in hiding; that the deceased in his dying declaration said that defendant had shot him: that defendant after shooting the deceased shot at another officer; that defendant was at no time fired upon until he had first drawn his gun or was fleeing to elude them,—is sufficient to sustain a conviction of murder in the first degree.—*Id.*
15. Where one who had committed a felony and had shown a disposition not to submit to arrest aimed a rifle at an officer, whom he well knew officially, and prepared to shoot him when commanded to stop and throw up his hands, it was not necessary to justify the attempted arrest that the officer should have first disclosed his official character and the reason for the arrest.

DAMAGES.

For unlawful construction of water ditch, see WATER RIGHTS, 5.

For obstructing ditch, see NEW TRIAL, 7.

DEEDS.

Action to reform, parties in, see HOMESTEAD, 2.

DISTRICT COURT.

The jurisdiction of the district court, sitting in probate matters is limited to the powers conferred upon it by statute. (*In re Higgins' Estate*, 15 Mont. 474; *Chadwick v. Chadwick*, 6 Mont. 566, cited.)—*State ex rel. Bartlett v. Second Judicial District Court*, 481.

DURESS.

Defense of, to action on note, see NEGOTIABLE INSTRUMENTS, 3, 4, 5, 6.

EJECTMENT.

Prior possession of land afterwards in railroad grant, see RAILROADS, 1.

Adverse possession of lands for the period of the statute of limitations will not be defeated because defendant's entry was not made under a paper title. (*National Mining Co. v. Powers*, 3 Mont. 344, cited.)—*Minnesota Land & Improvement Co. v. Braster*, 444.

ELECTIONS.

1. An election contest authorized by section 1043, Fifth Division of the Compiled Statutes, being a special proceeding, the jurisdictional facts must appear on the face of

the proceedings, and therefore where the statute permits a contest to be instituted only by an elector, the omission of the contestant to show by averment on the face of the record that he is an elector, is fatal.—*Gillespie v. Dion*, 188.

2. In an election contest instituted under section 1043, Fifth Division of the Compiled Statutes, where the contestant's statement failed to state a jurisdictional fact, no amendment offered or made after the lapse of the ten days allowed by the statute for instituting the contest could cure the defect or give the court jurisdiction to act.—*Id.*
3. Under section 1043, Fifth Division of the Compiled Statutes, requiring the contestant of an election to file, within ten days thereafter, a statement specifying the grounds of contest, a statement merely alleging that marked ballots were voted and counted in a certain precinct, and that owing to confusion at the time the votes were counted, mistakes were made, and which failed to state that the contestant was a candidate for the office in question, or that any one of the ballots were unlawfully marked, or the nature of the alleged mistakes, or that they affected the result, or the number of votes cast at that precinct, or that any electors were prevented from voting by fraud or other misconduct, is insufficient. A statement so defective cannot be cured by amendment after the time allowed by law for commencing proceedings has expired. (*Heyfron v. Mahoney*, 9 Mont. 437, cited.)—*Id.*
4. Sections 1200, 1209, 1211, 1212, 1218 to 1221, inclusive and 1224 to 1234 inclusive of chapter 3, Part III, title II of the Political Code, pertaining to the registration of voters, held in force.—*Steele v. Gūpatrick*, 458.
5. The time for opening registration offices is controlled by the provisions of section 1227, chapter 3, Part III, title II of the Political Code, and the registration of electors, as therein provided, may not lawfully begin before the second Tuesday of October preceding any general election.—*Id.*
6. Section 1238, *Id.*, prohibiting registration and voting in any county other than the one in which the elector actually resides at the time of his registration or in which he will have actually resided for thirty days before election day, is controlling as to the character of registration certificates permitted to be issued by registry agents.—*Id.*
7. Where a judicial district comprises two counties the nomination of a candidate for district judge by a political party at a county convention composed of delegates of that county alone, without the other county having an opportunity to participate in the proceedings is a nullity.—*State ex rel. Woody v. Rotwelt*, 502.
8. The conventions and primary meetings provided for by sections 1310, 1311, 1312 of the Political Code, held for the purpose of nominating candidates for public office, are meant to be organized assemblages of electors or delegates fairly representing the entire body of electors of the political party which may lawfully vote for the candidates of an such convention.—*Id.*
9. Section 1313 of the Political Code, permitting a candidate for public office to be nominated by certificate or petition signed by a certain percentage of the electors residing within the political division for which the officer is to be elected, contemplates simply the candidacy of one not a nominee of a party, as an independent or electors' candidate, and where no effective nomination for a particular office has been made by any convention or primary meeting held by the delegates of an organized political party for the purpose of nominating a candidate for that office, a person is not entitled to have his name placed upon the regular party ticket as a nominee for the office solely by petition of voters who nominate him as the candidate of such regularly organized party. In such case he is simply the candidate of those individual electors who have joined in nominating him and is only entitled to be placed upon the ballot as such a candidate.—*Id.*
10. A list of persons cannot be placed upon the official ballot as candidates of a so-called Silver Republican party upon a petition filed with the county clerk nominating such persons for their respective offices as candidates of such party. (*State ex rel. Woody v. Rotwelt*, ante, cited.)—*State ex rel. Ruwel v. Tooker*, 540.
11. The nomination of a list of persons as candidates of a so-called Silver Republican party by a certificate filed with the county clerk purporting to certify their nomination as by the central committee of the Silver Republican party is ineffectual where

no convention held by such party had ever delegated this power to a committee. (*State ex rel. Pigott v. Benton*, 13 Mont. 306, cited.)—*Id.*

12. A certificate purporting upon its face to be that of a county convention of the Silver Republican party and nominating a county ticket composed of Republicans, Silver Republicans, Democrats and Populists, is insufficient to authorize the placing of their names upon the official ballot, where it appeared that the nominations were in fact made at a meeting of some fifty members of a Silver Republican club having four hundred members; that the officers signing the certificates were the presiding officer and secretary of the club; that no primaries were ever held; no call for a convention ever made; nor any person ever elected as a delegate to a convention, or notice given that a convention was to be held,—since such proceedings were not those of an organized assemblage of delegates representing a political party within the meaning of section 1310 of the Political Code.—*Id.*
13. The nomination of a county ticket and presidential electors by a so-called Citizens Silver party convention is a nullity where the convention was participated in by twenty-one electors of the county who appeared in response to personal invitation and after acting as a county convention then proceeded to hold a state convention. It appearing that no call for a state convention was ever given or delegates elected to either convention, or notice published throughout the state or county of the gathering of the new party. (*State ex rel. Woody v. Rotwitt*, ante, page 502, affirmed.)—*State ex rel. Metcalf v. Johnson*, 58B.
14. Where a regular Republican county convention, after completing its business adjourns *sine die*, and a portion of the members of the convention, including the presiding officer and secretary, then re-assemble as a county convention of the Silver Republican party, which was a regularly organized political party in the state, without any call having been issued for, or any delegates elected to, such convention, its proceedings are illegal and void. (*State ex rel. Metcalf v. Johnson*, ante, 548, cited.)—*State ex rel. McLaughlin v. Bailey*, 554.
15. Where the regularly elected delegates to a republican county convention upon assembling were unable to agree on an organization, whereupon a portion of the delegates withdrew and assembling at another place, nominated a county ticket and adopted the name of the Silver Republican party, but without any intention of forming a new party, but for the purpose of designating the party for and as a principle only, and to prevent confusion in the identity of the two tickets the court will not interfere at the instance of one faction to restrain the county clerk from placing on the official ballot the ticket nominated by the other faction. Such a contention in the ranks of regularly elected delegates will be left to the electors to determine.—*State ex rel. Gillis v. Johnson*, 553.
16. The nomination of a person for an office as the candidate of a regularly organized party, as the Silver Republican party, cannot be made by petition although the petition was signed only by members of that party and was filed by direction of the state and county central committees of the district. Nor would such nomination be entitled to appear on the ballot in a separate column as the electors Silver Republican candidate, or as an independent nomination. (*State ex rel. Woody v. Rotwitt*, ante, page 502, cited.)—*State ex rel. Matt v. Reek*, 557.
17. An application to this court for an injunction to restrain a county clerk from placing certain names upon the official ballot, which involves a contention between two rival conventions of a political party, each claiming to be the only regular convention of that party and nominating candidates for the same county offices, and each being composed of delegates as to whom there was a showing that they were elected from the body of the electors of the county, will be dismissed for laches where the application which might have been made ten days earlier, was delayed until a time which left only a few hours for the consideration of important questions presented.—*State ex rel. Sligh v. Reek*, 561.

EMINENT DOMAIN.

Does not give right of way for ditch without condemnation proceedings, see WATER RIGHTS, 4.

EQUITY.

The judgment in an equity case is not controlled by the prayer for relief.—*State ex rel. Russell v. Tooker*, 540.

ESTOPPEL.

Of sureties on official bond, see COUNTY ASSESSOR, 3.

Where the owner of certain mining claims enters into a valid written agreement with another to convey to him a half interest in the claims upon the performance of certain conditions, and the latter performs such conditions, expending large sums upon the property, the benefits of which the owner receives, he will not thereafter be permitted to deny the existence of the claims or the validity of his own title thereto.—*Largay v. Bartlett*, 265.

EVIDENCE.

For purpose of impeachment, see CRIMINAL LAW, 1.
Of motives of defendant, see CRIMINAL LAW, 2.
Of defendant's statements to coroner, see CRIMINAL LAW, 3.
Of dying declarations, see CRIMINAL LAW, 13.
To sustain conviction for homicide, see CRIMINAL LAW, 14.
Of abandonment, see WATER RIGHTS, 1, 2.

1. Where land of a judgment debtor has been sold under an execution issued on a deficiency judgment on foreclosure of mortgage, the judgment roll in the foreclosure case is admissible to prove the original indebtedness, in an action by the judgment creditor to reform the deed by which judgment debtor acquired title to the land.—*Power v. Burd*, 22.
2. A homestead filing on public lands is admissible on the question of a judgment debtor's good faith in claiming a homestead in other lands upon which execution had been levied.—*Id.*
3. On a trial for murder, evidence that prior to the killing the defendant had had litigation or trouble about his land, which was offered for the purpose of showing the beginning of the trouble and the sentiment worked up against the defendant, was properly excluded until it might become relevant by connecting the deceased therewith; or until it was shown to relate to some circumstance that extenuated the killing.—*State v. Gay*, 51.
4. On a trial for murder evidence offered by the defense that some person, not a witness in the case, had burned the defendant's house some days before the homicide, was properly excluded as irrelevant where it did not appear that the deceased had participated in the burning.—*Id.*
5. Where in an action on a bond, letters purporting to have been written to the plaintiff by the principal defendant are introduced by the plaintiff for the purpose of impeaching him, and the letters affected the liability of the defendant sureties, it was error to refuse to allow the sureties to prove by their principal that while the letters were signed by him, they were written by another at the suggestion of the plaintiff, and the purpose for which they were so written.—*Kennelly v. Savage*, 119.
6. Evidence of the contents of a lost bill of sale or deed from the administrator of plaintiff's predecessor in interest was properly excluded where it did not appear that the grantor in the instrument was an administrator, or that he had authority to execute the paper.—*Gassert v. Noyes*, 216.
7. Where a stenographer is called to prove the testimony given by a witness on a former trial of the case, in respect to having written a certain letter, it is error to refuse to permit the adverse party to cross-examine him for the purpose of bringing out the testimony of the witness as to the circumstances under which the letter was written, or to reject such proof when the adverse party makes the stenographer his own witness. (*Territory v. Rehberg*, 6 Mont. 471; *State v. Jackson*, 9 Mont. 518; *Kennelly v. Savage*, ante, page 119, cited.)—*DuVivier v. Phillips*, 370.

Proof of the admissions of a defendant, who was not in court, that the other defendants sustained the relation of partners to him, would not be evidence of the partnership as against the other partners. (*Wiggin v. Fine*, 17 Mont. 5.5, cited.) - *Congdon v. Olds*, 487.

EX POST FACTO LAW.

When statute is not, as to rule of evidence, see CONSTITUTIONAL LAW, 1.

EXECUTION.

Sale of homestead under, see HOMESTEAD, 1.

Issuance and return of, in creditor's bill, see CREDITOR'S BILL, 1.

EXECUTORS AND ADMINISTRATORS.

1. An executrix of an estate cannot maintain an action in her personal capacity against herself in her representative capacity, upon a claim against the estate, incurred for funeral expenses, which she had approved, as executrix, but which had been disallowed by the court and which, after being so disallowed, had been assigned to her by the owners; nor upon a claim for an allowance as the widow of the decedent.—*Phillips v. Phillips*, 305.
2. Section 167 of the Probate Practice Act (1887) providing that if an executor is a creditor of the decedent and his claim has been presented to the probate judge and rejected he may maintain an action thereon against the estate, contemplates an existing debt, and does not authorize an action on a claim paid by an executrix, personally, after the decedent's death and in the course of administration; nor does it authorize an action for an allowance by the widow of the decedent while acting as executrix.—*Id.*
3. An executrix may appeal in her representative capacity from an order directing a partial distribution of the estate. (*In re McFarland's Estate*, 10 Mont. 445, cited; *In re Diwar's Estate*, 10 Mont. 422, distinguished.)—*In re Phillips Estate*, 311.
4. On an appeal by an executrix in her official capacity, matters affecting her personal share of the estate as the widow of the decedent and as a legatee, are not brought before the appellate court for review.—*Id.*
5. An order directing the partial distribution of an estate will be sustained on an appeal by the executrix, where it appeared that, after deducting the amount to be distributed from the balance in the hands of the executrix, as shown by her final report, there remained a sufficiency to pay a legacy to her as widow, and all expenses of administration as well as her claim for an allowance for support during the settlement of the estate.—*Id.*
6. It is no objection to an order directing the partial distribution of an estate, that the final account of the executrix had not been allowed, and hence it could not be known what amount was subject to distribution, where the order was conditioned upon the giving of a bond to the executrix to indemnify the estate.—*Id.*
7. The pendency of a suit brought by the executrix in her personal capacity against herself in her representative capacity to recover for moneys paid for funeral expenses, whereby the amount subject to distribution was rendered uncertain, was properly ignored by the court as an objection to an order of partial distribution, where it had already been decided that such action could not be maintained.—*Id.*
8. A widow is entitled as a matter of right to a reasonable allowance during the progress of the settlement of the estate, and her financial ability to support herself without such aid is immaterial in determining her right to such allowance.—*Id.*
9. The functions of a special administrator being limited by sections 2500, 2504 of the Code of Civil Procedure, to the exercise of powers necessary to collect and preserve the estate for the executor or administrator to be regularly appointed, an order by a district judge directing a special administrator to pay an indebtedness of the estate is void.—*State ex rel. Bartlett v. Second Jud. Dist. Court*, 481.
10. Section 2623 of the Code of Civil Procedure, being part of the chapter entitled "claims against the estate," and providing that "if there be any debt of the decedent bearing

interest, whether presented or not, the executor or administrator may by order of the court or judge, pay the amount then accumulated and unpaid at any time when there are sufficient funds properly applicable thereto," relates to the payment of claims during the regular course of administration and does not authorize an order directing the payment of a claim by a special administrator.—*Id.*

11. An order of the district court directing the payment by a special administrator of an indebtedness of the estate, being without jurisdiction, is reviewable on *certiorari*.—*Id.*
12. A special administrator is a party beneficially interested in an application for a writ of *certiorari* to review an order of a district court, made without jurisdiction, under the terms of which he would be obliged to pay to a creditor of the estate money which he had collected and ought to preserve for the general administrator.—*Id.*
13. Section 55 of the probate practice act (1887) providing that letters of administration must be granted, first, to the surviving husband or wife, "or some competent person whom he or she may request to have appointed," preserves to a widow, who is disqualified under section 59 *Id.*, by reason of minority, the right to nominate a person legally qualified to apply for letters of administration and such person is entitled to be appointed in preference to the public administrator.—*In re Stewart's Estate*, 55.
14. Section 58 of the probate practice act (1887) which provided that "if any person entitled to letters is a minor, letters must issue to his guardian or any other person entitled to letters of administration in the discretion of the court," had application to minors generally, other than to a surviving husband or wife under the age of majority yet old enough to lawfully contract the marital relation. As to minors sustaining such relationship the statute giving the right to nominate is special and controls.—*Id.*

FELLOW SERVANTS.

Foreman of railroad gang is fellow servant with laborers, see NEGLIGENCE, 1, 6.

FINDINGS.

Not advisory in lien foreclosure when no equity issue involved, see MECHANIC'S LIEN, 1. Will not be disturbed because of conflict in evidence, see NEGLIGENCE, 2.

FIRE INSURANCE.

See INSURANCE COMPANY.

1. Contracts of insurance, having for their object indemnity, should be liberally construed in favor of the insured, and the words of the agreement should be applied to the subject matter about which the parties are contracting at the time, the presumption being that such matter is in the minds of the parties at the time of their agreement.—*Holler Lumber Co. v. Fireman's Fund Ins. Co.*, 237.
2. On an issue as to whether the building burned was the property covered by a policy which described the insured premises as a one story frame building and additions while occupied as a dwelling and green house, evidence that plaintiff, when solicited by defendant's agent for insurance, stated that he intended to remove his dwelling house to the lots afterwards described in the policy and connect it with a greenhouse, then being constructed, and would then insure; that the policy was issued after the dwelling was removed to the lots, though it was never connected with the greenhouse, and that the building destroyed was a one story frame house and the same one which had been removed to the lots, but to which additions had been made, establishes *prima facie* the loss of the building described in the policy and the granting of a nonsuit was error.—*Id.*
3. Proof of the destruction of a one story frame building, occupied only as a dwelling, and not connected with a greenhouse, situated upon the insured premises, does not, *prima facie*, relieve the insurance company from liability upon a policy in which the description called for a one story frame building, occupied as a dwelling and greenhouse, where the evidence tended to show that the company and the insured understood, when the policy was issued, that each structure was to be used for its proper purposes.—*Id.*

4. Proof that the defendant's agent expressly waived formal proofs of loss after the fire, saying that the defendant was ready to pay its loss, tends on motion for a nonsuit to identify the house destroyed as the house insured.—*Id.*
5. In an action on an insurance policy, the original cost of the property destroyed, the cost of a like building at the time of the trial and the difference in value between the house burned and a new one by reason of age and use are proper subjects of inquiry in determining the value at the time of the loss.—*Id.*
6. The right of a foreign insurance company to recover on a contract in this state is not affected by failure to file in the office of the secretary of state and the county recorder, the papers designated in chapter 24, Fifth Division, Compiled Statutes, 1887. (*State ex rel. Aachen & Munich Fire Insurance Co. v. Rotwitt*, 17 Mont. 41, affirmed.)—*Palatine Insurance Co. v. Crittenden*, 413.

FORECLOSURE.

Of mechanic's lien, See MECHANIC'S LIEN, 1.
Of mortgage, See MORTGAGES.

FRAUD.

Knowledge of, by grantee, See FRAUDULENT CONVEYANCE, 1.

Sufficiency of defense, in action of replevin, See REPLEVIN, 1.

In assignment by insolvent, See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1, 2.

1. One occupying the fiduciary relation of a trusted agent, both of the defendant who was the owner of the mining claims in controversy and also of the plaintiff, who was entitled to a conveyance of a half interest therein, and who has full knowledge of the contract relations existing between his principals, cannot, by availing himself of knowledge obtained in such capacity, defeat the rights of the plaintiff to a conveyance by an attempted relocation of the claims, sought to be accomplished by altering the names of the claims and the locators upon amended notices of location which he had posted for the benefit of his principals.—*Largay v. Bartlett*, 265.
2. The fact that the agent in such case inserted the name of his wife as locator of the claims in question in attempting to relocate them, was fraud against his principals and could not avail him or her as against the plaintiff.—*Id.*
5. In an action by the wife to quiet title to mining claims, which had been relocated in her name by her husband, while acting as an agent both for the owner and one having an equitable title to a half interest, the consent of the owner to appear and for the case to proceed, his refusal to file an answer and waiver of trial by jury, are evidences of collusion between himself and the plaintiff in such action to defraud the equitable owner of his interest in the claims, and a judgment so obtained will be annulled for fraud and collusion in an action brought for that purpose by the latter.—*Id.*
4. The assignee of a contract may set up fraud in the contract as executed, and rely upon the real contract.—*Sanford v. Gates*, 398.

FRAUDULENT CONVEYANCE.

1. A deed made by the owner of the legal title to mining premises to a third person for the purpose of defrauding the plaintiff who owned an equitable interest in the property, and taken by such grantee, with knowledge of such interest is void as against the plaintiff.—*Largay v. Bartlett*, 265.
2. A conveyance by the defendant of his property to his surety on certain notes to secure him against liability thereon, and in consideration of the surety also assuming the payment of further indebtedness of the defendant, is not fraudulent as against creditors of the defendant whose claims were not embraced among those to be paid by the surety.—*Tudor v. DeLong*, 499.

INSTRUCTIONS.

GARNISHMENT.

See ATTACHMENT.

GUARDIAN.

1. The death of a ward is a discharge of the guardian within the meaning of section 404 of the Probate Practice act (1887), providing that an action against the sureties on a guardian's bond must be commenced within three years from the discharge or removal of the guardian.—*Berkin v. Marsh*, 152.
2. A legal disability to sue pertains to the person desiring to sue and not to the cause of action, and therefore, though a cause of action on a guardian's bond may not accrue until after the guardian's final accounting, this does not place the administrator of a deceased ward under a disability from the time of the ward's death until the accounting, within section 404 of the Probate Practice act (1887), limiting actions against a guardian's sureties to three years from the discharge of the guardian, unless the person entitled to bring the action is under a legal disability to sue.—*Id.*
3. The provision of section 404, Probate Practice act (1887) requiring action against the sureties on a guardian's bond to be brought within three years, is a special statute of limitations for the benefit of the sureties, and not for the principal.—*Id.*

HOMESTEAD.

1. Actual occupancy of land claimed as a homestead is necessary in order to exempt it from sale on execution under section 322, First Division of the Compiled Statutes, allowing a judgment debtor a homestead in a given quantity of land "and the dwelling house thereon, and its appurtenances, owned and occupied" by the debtor, and where no improvements of any kind have been made upon land and neither the owner nor his family have ever occupied any part of it, the sale upon execution cannot be prevented by a mere declaration of intention to claim and occupy the land as a homestead.—*Power v. Burd*, 22.
2. Where a judgment debtor has no homestead rights in lands sold under execution, his wife is not a necessary party to an act on by the judgment creditor to reform the deed by which the debtor acquired title to the land in controversy.—*Id.*
3. A homestead filing on public lands is admissible on the question of a judgment debtor's good faith in claiming a homestead in other lands upon which execution had been levied.—*Id.*

INJUNCTIONS.

To restrain bond issue by county, see COUNTIES, 2, 6.

To restrain printing of name on official ballot, see ELECTIONS, 15.

Application for, when dismissed for laches, see ELECTIONS, 17.

Where it appeared on application for a preliminary injunction in an action by the owner of the majority interests in mining premises, that the defendant as lessee of the owner of the minority interests, while not actively excluding plaintiff company, was working the properties and extracting ores therefrom against the protest of the plaintiff, that defendant had promised plaintiff's president to desist but had resumed operations when the latter left the state, and had attempted to conceal shipments of ore, the granting of the injunction on the ground that defendant as a tenant in common was assuming exclusive ownership over the property, within section 592, Code of Civil Procedure, will not be disturbed on appeal as an improper exercise of judicial discretion. (*Anacosta Copper Mining Co. v. Butte & Boston Mining Co.*, 17 Mont. 519, cited.)—*Red Mountain Consolidated Mining Co. v. Esler*, 174.

INSTRUCTIONS.

As to reasonable doubt, see CRIMINAL LAW, 5.

As to penalties in homicide, see CRIMINAL LAW, 10.

As to dying declarations, see CRIMINAL LAW, 11.

As to sufficiency of discovery, see MINES AND MINING, 1.

As to duress and want of consideration, see NEGOTIABLE INSTRUMENTS, 3.

As to mining partnership, see PARTNERSHIP, 3, 4, 5.

Sufficiency of specifications as to, see APPEAL, 17.

1. The court not being required by section 2070 of the Penal Code, to give an instruction in any modified form, a party offering an erroneous instruction cannot complain that it was not corrected and then given.—*State v. Gay*, 51.
2. Where a statement of testimony is contained in an instruction, the statement should be so framed as not to subject the instruction to the charge of being the court's conclusion from facts disputed on the trial.—*McShane v. Kenkle*, 208.
3. Instructions should be considered together and where the law of contributory negligence is fully laid before the jury in several instructions, error cannot be predicated of a failure to incorporate it as a limitation to one particular instruction complained of.—*Cannon v. Lewis*, 402.
4. An objection that the court assumed certain facts as true in an instruction laying down a rule for the estimate of damages, is not well founded where the instruction was given wholly upon the hypothesis of the evidence showing certain facts before any damages could be awarded.—*Id.*

INSURANCE COMPANY.

See FIRE INSURANCE.

Foreign, organization, see CORPORATIONS, 2.

Foreign, fees of, to secretary of state, see CORPORATIONS, 3.

Foreign, right to recover on contract, see FIRE INSURANCE, 6.

Foreign, designation of agent to receive process, see CORPORATIONS, 4.

Action on policy, see FIRE INSURANCE, 1, 2, 3, 4, 5.

INTEREST.

Recovery of, in action against building and loan association, see CORPORATIONS, 6.

INTERVENTION.

By junior attaching creditor, see ATTACHMENT, 1, 2.

1. A complaint in intervention, filed in an action to foreclose a mortgage upon city lots, in which the intervenor alleged title to certain of the lots included in the mortgage, which had been conveyed to him by the mortgagor prior to the mortgage, is properly dismissed, where, after the filing of the complaint in intervention the plaintiffs amended their complaint so as to exclude the lots in controversy, since the intervenor had then no further interest in the matter in litigation.—*Murphy v. Cannon*, 348.
2. It is no objection to the dismissal of the complaint in intervention in such case that the intervenor was entitled to a judgment requiring the mortgagor to file with the county clerk and recorder a plat of a proposed addition to the city including his lots as demanded in the complaint, where the city and county would be interested in the filing of such a plat and were not parties to the action.—*Id.*
3. Where one of two joint mortgagees institutes an action against the sheriff on his official bond for failure to pay over the proceeds of a sale of the mortgaged property in satisfaction of his claim, which is alone sufficient to exhaust the penalty of the bond, the other mortgagee, whose claim is likewise unpaid, has such an interest in the matter in litigation as to entitle him to intervene. (*Maddox v. Rader*, 9 Mont. 126, affirmed.)—*Maddox v. Teague*, 593.

JUDGMENT.

Ownership of, must be pleaded in creditor's bill, see CREDITOR'S BILL, 3.

On pleadings, see TRIAL, 4.

1. In an action by a judgment creditor against the judgment debtor, and other defendants alleged to have money belonging to the judgment debtor, where the complaint

shows the rendition of the original judgment, the issuance of execution and levy by garnishment upon the co-defendants and their refusal as garnishees to pay over the money, and alleges that such money belongs to the judgment debtor individually, as answer which alleges, in effect, that the garnishees have money due upon a purchase of property from the judgment debtor, but as to whether it belongs to him personally or in a representative capacity they have no knowledge, raises no issue.—*Sweeney v. Schlessinger*, 328.

2. In an action brought under section 356 of the Code of Civil Procedure (1887) providing that if it appear that a person or corporation alleged to have property of the judgment debtor claims an interest therein adverse to him or denies the debt, the court "may authorize, by an order to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt," it is not necessary for the plaintiff to allege as a part of his cause of action that an order was made by the court permitting the action to be brought.—*Id.*

JURORS.

Misconduct of, see **NEW TRIAL**, 1.

JURISDICTION.

Of district court in probate, see **DISTRICT COURT**, 1.

JUSTICE OF THE PEACE.

Acts judicially in inserting name of a stranger in execution, see **CERTIORARI**, 1.

LAUNDRY LICENSE TAX.

Constitutionality of, see **CONSTITUTIONAL LAW**, 4, 7, 8, 9.

LAW OF THE CASE.

See **RES JUDICATA**.

LICENSE.

See **LAUNDRY LICENSE TAX**.

LIS PENDENS.

See **MORTGAGES**, 7.

MANDAMUS.

To compel foreign fire insurance company to file certificate designating agent, see **CORPORATIONS**, 4.

MARRIED WOMEN.

Section 1448, Fifth Division of the Compiled Statutes, conferring upon a married woman the same right to convey her separate real estate that a married man has, being a subsequent enactment, repealed, in so far as it is repugnant thereto, section 284, *Id.*, providing that a married woman may convey her real estate by any conveyance executed and acknowledged by herself and her husband, and therefore the failure of the husband to join in a lease by the wife of her separate property does not render the conveyance void.—*Kennelly v. Sarage*, 119.

MASTER AND SERVANT.

Negligence of railroad foreman, see **NEGLIGENCE**, 1.

MECHANIC'S LIEN.

Foreclosure of, sufficiency of specifications of error, see *NEW TRIAL*, 8, 9.

1. In an action for the foreclosure of a mechanic's lien filed against a building, the interior of which the plaintiff had papered, where the only controversy was as to the number of rolls of paper hung, which involved the question as to whether a roll of paper meant deducting anything for waste or not, findings of the jury upon these questions were not advisory merely, since there was no equity issue involved, and therefore a motion to set them aside was properly denied. And when in such case the evidence upon which the findings were based was conflicting, and it could not be said that the jury did not have testimony justifying their findings, an order denying a new trial will not be disturbed.—*Marsh v. Morgan*, 19.
2. Under section 1874, Fifth Division, Compiled Statutes, providing that liens for work or labor done or materials furnished shall be prior to, and have precedence over, any mortgage, incumbrance or other lien made subsequent to the commencement of work on any contract for the erection of such building, structure or other improvement, a lien for plastering takes precedence to a mortgage given after the commencement of work on various contracts for the erection of the building, although the plastering was not done until after the date of the mortgage. (*Mason v. Germaine*, 1 Mont. 263; *Merrigan v. English*, 9 Mont. 113, cited.)—*Murray v. Swanson*, 533.
3. The act of March 14, 1889, (16th session) allowing the plaintiff in an action for the foreclosure of a mechanic's lien a reasonable attorney's fee as costs has application only to the court in which the action is instituted and does not authorize the allowance of an attorney's fee as part of the costs in the supreme court.—*Id.*

MINES AND MINING.

Injunction by one tenant in common of mining property against cotenant, see *INJUNCTION*, 1.

Agreement to convey interest in mining claim, when estops, see *ESTOPPEL*, 1.

Relocation when fraudulent, see *FRAUD*, 1, 2, 3.

Mining partners, see *Partnership*, 3, 4, 5.

An instruction in effect, that to constitute a discovery on a vein sufficient in law to justify a location, the vein must contain mineral, quartz or ore, of such a nature that a practical miner if he encountered it, would feel justified in following it up in the expectation of finding paying mineral in that particular seam upon which the discovery is made, is erroneous (1) in restricting a discovery to such a vein as "a practical miner" would feel justified in developing, instead of extending it to such a vein as the locator, who ever his vocation might be, would be justified in developing; and (2) in confining the discovery of paying mineral to "that particular seam" upon which the discovery is made, since a valid location may be made by the discovery of a seam with a well defined wall, bearing indications of mineral sufficient to justify the locator in following it up in expectation of finding a main body of paying ore within the limits of the claim as located.—*McShane v. Kenkle*, 208.

MORTGAGE.

Precedence of mechanic's lien over, See *MECHANIC'S LIEN*, 2.

Where debt secured by, creditor cannot attach, See *ATTACHMENT*, 7, 8.

Intervention by joint mortgagee, See *INTERVENTION*, 3.

1. Where the defendants in an action to foreclose a mortgage for default in interest, interposed several defenses, one of which was that by reason of a mutual mistake in the mortgage, foreclosure for nonpayment of annual interest was authorized, which was not the intent of the parties whereby the action was prematurely brought, and the jury found for the defendants upon that issue alone, and were instructed that if they did so find they need go no further in the case, the judgment rendered thereupon is not *res judicata* as to the other equitable defenses in a subsequent action brought to foreclose the mortgage upon full maturity of the debt. (*Kletschmidt v. Binzel*, 14 Mont. 31 cited.)—*Gassert v. Black*, 35.

2. A determination that a mortgage did not express the intention of the parties in authorizing foreclosure upon default in interest, and that the action was therefore premature, does not require a subsequent action, instituted upon the maturity of the entire debt, to be brought as upon a reformed mortgage.—*Id.*
3. Section 1285 of the Code of Civil Procedure of 1885, allowing judgment debtors one year in which to redeem, is applicable to a decretal sale of mortgaged premises thereafter made although at the time the mortgage was given the period for redemption was six months. Such extension of the period for redemption does not impair the obligation of the contract between the mortgagor and the mortgagee when the latter becomes the purchaser, because by purchasing his character as mortgagee ceases and he necessarily subjects himself to the law then in force defining the rights of purchasers. Nor is the obligation of the contract impaired by the fact that such extension may tend to reduce the number and amount of bids at the foreclosure sale, for such contingencies are too remote to justify the conclusion that such legislation affected the value of the mortgage contract.—*State ex rel. Thomas Cruse Savings Bank v. Gilman*, 94.
4. A recorded mortgage describing the premises as lot 16 in block 57 is not notice that the parties intended it to be a mortgage on lot 16 in block 57.—*Baker v. Bartlett*, 446.
5. The plaintiff in an action to reform a mortgage so as to describe the property intended to be mortgaged and to foreclose the same is not a "purchaser" nor is a notice of *lis pendens* filed at the time of the commencement of the action a "conveyance" within section 260, Fifth Division of the Compiled Statutes, providing that every unrecorded conveyance of real estate shall be deemed void as against "any subsequent purchaser in good faith for a valuable consideration of the same real estate when his own conveyance shall be first duly recorded," so as to defeat a conveyance made by the mortgagor subsequent to the mortgage to a purchaser in good faith for a valuable consideration, without actual notice of the mortgage, whose deed was delivered prior to, but not recorded until after, the record of the notice of *lis pendens*.—*Id.*

NEGLIGENCE.

Instructions as to, see INSTRUCTIONS, 3, 4.

1. The foreman or boss of a small extra gang of six men engaged in repairing the defendant's railroad is not clothed with the control and management of a distinct department, but of a mere separate piece of work in one of the branches of service in a department, and therefore, negligence of the foreman in not giving warning before ordering the men to bear down on a rail which broke and injured the plaintiff, a laborer in the gang, was not the neglect of a duty which the defendant company was bound to perform, but was the negligence of a fellow servant for which the company was not liable.—*Goodwell v. The Montana Central Railway Co.*, 298.
2. Where the evidence in an action for personal injuries amply sustains the finding of the jury that there was no railing in front of an excavated lot at the point where plaintiff fell into the cellar, the finding will not be disturbed on appeal because of a conflict in the evidence.—*Cannon v. Lewis*, 402.
3. Knowledge by the plaintiff of an excavation adjoining a sidewalk, upon which he was walking on a dark night, and into which he fell, and failure to avoid it by walking on the outside of the sidewalk, was not contributory negligence where there was no defect in the sidewalk at that point which made it dangerous to walk thereon.—*Id.*
4. The rule that a person approaching a known place of danger must be vigilant to avoid it, must be considered in connection with the further one that a traveler upon a city highway is, as a general rule, justified in assuming it to be safe.—*Id.*
5. That defendant did not know that a part of the rail in front of the excavation had been removed prior to the accident cannot avail him when he was upon the premises at least once a week and passed there every day, and his negligence was therefore a question for the jury.—*Id.*
6. A laborer employed by and acting under the orders of a section foreman on a rail-

road, who is injured by the negligence of the foreman in not warning him of the approach of a yard engine, and the negligence of the engineer of the yard engine in operating his engine at dusk without using the whistle or bell and without a head-light, is a fellow servant with such foreman and engineer, and therefore the railroad company is not liable for the injuries resulting from their negligence. (*Goodwell v. Montana Central Railway Co.*, ante, 293, cited.)—*Hastings v. Montana Union Railway Co.*, 498.

NEGOTIABLE INSTRUMENTS.

Contemporaneous agreement in respect to, see CONTRACTS, 1.

1. A parol agreement between the defendant and one acting as agent for the plaintiff and B., entered into at the time of the execution of certain notes given in consideration of the purchase of property by the defendant from B, that the notes should be paid by being credited upon an account which B owed the defendant, is not an agreement changing the terms of the note, but is a reservation by the defendant of the right to pay them by offsetting B's indebtedness to him, and may therefore be pleaded in defense to an action on the notes. (*Bohn Manufacturing Co. v. Harrison*, 13 Mont. 239, cited.)—*Bennett v. Tulmon*, 23.
2. An accommodation endorser of a negotiable note is released from liability by a change in the date of the note without his consent after endorsement, and the mere knowledge by the endorser of the terms of a contract between the maker and the payee, for the fulfillment of which the note was given, is insufficient to operate as an implied consent that the date of the note might be changed to conform it to the intention of the parties to such contract. Nor would an attempt by such endorser, after receiving notice of protest, to make terms with the holder for future payment, operate as a consent to or ratification of such alteration, in the absence of knowledge that it had been so altered.—*McMillan v. Hefferlin*, 385.
3. In an action by an endorsee of a promissory note in which the defendant pleaded want of consideration and duress and that the plaintiff had purchased the note after maturity with knowledge of such defenses, the endorsee is not obliged to show in his case in chief that he purchased the note without notice of such defenses, but may do so in rebuttal, after the defendant's evidence has made necessary an affirmative showing of good faith.—*Rosetter v. Loeber*, 372.
4. The defense of duress in the execution of a promissory note is established by uncontradicted evidence to the effect that defendant, who owned a fourth interest in a mine, which had been leased, was surrounded by a party of twelve or fifteen miners, employees of the lessee, who demanded a settlement of their wages; that one of the miners told defendant, that if he did not settle their claims right then he would shoot him, and another told him that if he got on the wagon they would pull him off; that defendant was then crowded by them into a room in a hotel and held there for two hours, being told when he tried to go out, that he could not leave until he settled; that a witness with defendant was told that he could go but if defendant attempted to make a move for the wagon, they would pull him off with a rope; that the witness communicated this threat to defendant, who then signed certain notes saying that he did so to get away.—*Id.*
5. Where duress and want of consideration were pleaded in defense to an action on a promissory note and duress was proved, it was error to charge the jury that it was incumbent upon the defendant to establish his defenses by a preponderance of the evidence, since defendant was not bound to prove both such defenses, nor by a preponderance of the evidence.—*Id.*
6. Under a defense of duress, in the case at bar, the question was not as to whether the threats were of such a character as to be likely to terrify a man of defendant's firmness, but whether the defendant, presumably of ordinary firmness, was actually threatened with violence or restraint, or was restrained and actually and reasonably in fear of personal injury or confinement, under the influence of which he acted in executing the note.—*Id.*

NEW TRIAL.

- 1 Affidavits of jurors are competent to rebut affidavits charging misconduct on their

part, made in support of a new trial, and where the misconduct was alleged to consist in the discussion, within the jury room, of an incestuous contract, said to have been made by the defendant, and in separating among spectators in the court-room during recess where the contract and the merits of the case were being discussed, the motion was properly denied where the affidavits of the jurors showed that the contract was not spoken of until after the verdict had been agreed to and which was based solely upon the evidence and instructions, and the bailiffs made affidavit that no one conversed with the jurors during recess. (*Territory v. Burgess*, 8 Mont. 58; *State v. Jackson*, 9 Mont. 508; *State v. Anderson*, 14 Mont. 511, cited.)—*State v. Gay*, 51.

2. A new trial upon the ground of newly discovered evidence, based upon the affidavit of a member of the sheriff's posse that they were instructed to take no chances and to kill the defendant on sight, is properly denied, where the officer by counter affidavit, as well as the sheriff, stated that the instructions were not to shoot unless absolutely necessary.—*Id.*
3. A new trial upon the ground of newly discovered evidence is properly denied where the uncontradicted affidavit of the prosecuting attorney completely rebuts the affidavits in support of the motion, by showing that all the newly discovered evidence could have been easily procured on the trial.—*Id.*
4. Where there is a substantial conflict in the evidence as to the character of the contract sued on, an order granting a new trial will not be disturbed on appeal where no abuse of discretion appears.—*Ray v. Crown*, 259.
5. An amended notice of motion for a new trial, filed after the time for serving the notice of intention has expired, is too late to cure a defect in the original notice.—*State v. Mason*, 362.
6. Where an original notice of motion for a new trial specifies no error in a particular instruction the notice cannot be amended so as to specify error in such instruction, for this would not be the amendment of anything contained in the original notice but the introduction of a wholly new specification. (*Gillespie v. Dion*, ante, page 183; *Barbour v. Briscoe*, 8 Mont. 214, cited.)—*Id.*
7. In an action for damages for injury to plaintiff's crop by reason of defendant obstructing the flow of water in plaintiff's ditch, where it appeared that plaintiff's crop consisted of timothy hay and potatoes; that he had need of the water about May 20th but did not obtain it until June 20th; that he then used it on such portions of the hay crop as he could irrigate day and night; that he had sacrificed his potato crop and a portion of the hay crop in order to save the balance of the hay, a verdict for plaintiff will not be disturbed on appeal where the evidence was conflicting as to whether plaintiff's method of irrigation was proper.—*Barnett v. Brown*, 367.
8. A specification in an action to foreclose a mechanic's lien, that the court erred in finding that the plaintiff's assignor was in any way incapacitated from making a contract with the defendant contractor to furnish the materials described in plaintiff's complaint to the C. & L. building by reason of any relations existing between him and C. & L. defendants, and the evidence herein wholly fails to sustain the finding of the court in this particular, is wholly insufficient under section 293 of the Code of Civil Procedure (1897) as a specification of an error of law, for if in so finding there is any cause for complaint it is not that there was any error of law but that the evidence did not sustain the finding. And if the language used be regarded as a specification of insufficiency of the evidence it is wholly bad in failing to point out the particulars in which the evidence is insufficient. (*First National Bank v. Roberts*, 9 Mont. 322; *Zickler v. Deegan*, 16 Mont. 198, cited.)—*Burdwell v. Anderson*, 528.
9. A specification that "the findings of the court to the effect that the value of the materials described in the complaint had not been sufficiently proven, are unsupported by the evidence and in direct conflict with the same and are one of the errors specified by the plaintiffs herein," is wholly bad as a specification as to the insufficiency of the evidence in that it fails to point out the particulars in which the insufficiency consists as required by section 293 of the Code of Civil Procedure (1897).—*Id.*
10. A mere statement in a notice of intention to move for a new trial that it is based "on the ground of errors in law occurring at the trial and excepted to by the plaintiff," is a wholly insufficient specification of errors. —*Benham v. Lemht Mining, Milling and Reduction Co.*, 591.

NON SUIT.

Directing verdict is equivalent to, see **APPEAL**, 12.

How reviewed, see **APPEAL**, 13.

Order directing, and dismissing action, appealable, see **APPEAL**, 16.

On a motion for a nonsuit the law regards the issues proved which the evidence tends to prove. (*Soyer v. Great Falls Water Co.*, 15 Mont. 1.)—*Holler Lumber Co. v. Fireman's Fund Insurance Co.*, 282.

NORTHERN PACIFIC GRANT.

1. The decision of the secretary of the interior that certain lands were not embraced within the grant to the Northern Pacific Railroad company, cannot be collaterally attacked in an action by the patentee thereof to recover money paid to the defendant on a contract for the sale of the lands. (*Colburn v. Northern Pacific R. R. Co.*, 18 Mont. 476, followed.)—*Moore v. Northern Pacific R. R. Co.*, 290.
2. The defendant's remedy in such case, if any, is in equity by a suit to vacate the patent, brought either in its own name or through the government.—*Id.*

OFFICERS.

Liability for money received from garnishee, see **ATTACHMENT**, 3.

OFFICIAL BOND.

Of county assessor, liability of sureties on, see **COUNTY ASSESSOR**, 1, 2, 3.

PARTIES.

In action to reform deed, see **HOMESTEAD**, 2.

Legal disability to sue, see **GUARDIAN**, 2.

In action to enjoin bond issue by county, see **COUNTIES**, 7, 8.

Misjoinder of, when not considered on appeal, see **APPEAL**, 15.

Identity of plaintiff and defendant, see **EXECUTORS AND ADMINISTRATORS**, 1.

PARTNERSHIP.

Admissions of partner, see **EVIDENCE**, 8.

1. Where H. loaned defendants, a banking firm, \$5,000 for a certain period, under an agreement that in consideration of the loan said H. should be entitled to the rights of an equal partner, without liability for losses, and at the expiration of the period named should receive one-third of the net profits accruing in the business, with the privilege of continuing the agreement, and in the event of the one-third of the profits not equalling in amount ten per cent. per annum on the loan, H. might waive his right to profits, whereupon defendants would pay him interest on the loan at ten per cent. per annum, and at the expiration of such period H. exercised his option to take the interest on his money instead of participating in the profits, this arrangement did not make H. a partner with the defendants as between themselves, nor constitute the loan a contribution to the capital stock.—*Hunter v. Conrad*, 177.
2. In such case where H. was acting as cashier of the bank, and at the expiration of the contract made the proper entries in the books showing his election to take the interest instead of the third of the profits, such entries were a sufficient notice to defendants that he had so elected.—*Id.*
3. In an action on a promissory note signed by one of the defendants, which signature was alleged to be a firm name under which all the defendants were operating a mine as partners, it was error to charge the jury, in effect, that if parties associate themselves together for the purpose of carrying on a business and agree to contribute funds, pay losses and share profits, such an association is a general partnership without regard to whether the business is mining or not, since the elements of a partnership stated in the instruction would exist in a mining partnership as well as in a general partnership, and the instruction withdrew from the jury the consideration of whether the defendants were a mining partnership.—*Congdon v. Olds*, 487.
4. Error in such instruction would not be rendered harmless because of evidence that defendants were liable by their conduct in reference to the note, even if they were a

mining partnership, since under such instruction the jury would not be required to make inquiry as to whether the facts showed that the defendants were liable as a mining partnership.—*Id.*

5. Where the defendants alleged that they were not conducting the mine as a partnership at the time the note sued on was given, but that an incorporated company, of which they were stockholders, was conducting the business, a verdict for the plaintiff will not be set aside as contrary to an instruction to find for the defendants if the jury found that the corporation was conducting the business, where there was evidence tending to show that while the corporation had been formed it was not in fact conducting the business.—*Id.*

PLEADING.

Amendment of, during trial, see TRIAL, 2.

In creditor's bill, see CREDITOR'S BILL, 1, 2, 3.

Complaint in action to recover subscription, see CORPORATIONS, 5, 6.

In action to enjoin bond issue, see COUNTIES, 2, 3.

Under city ordinance, scandalous matter, see CITY ORDINANCE, 1.

Allegation of permission to sue garnishee, see JUDGMENT, 2.

Departure in, when not reviewed, see APPEAL, 20.

Complaint in replevin against sheriff, see SALES OF PERSONALTY, 1.

Judgment on, what constitutes, see TRIAL, 4.

1. In an action by a firm of attorneys to recover for professional services, a complaint which alleges a copartnership between plaintiffs; that at a certain time they performed certain services for defendants, as attorneys, at the special instance and request of the defendants; the reasonable value of the services; and that defendants have not paid the same, is good on general demurrer, and by answering defendants waived any defects in the cause of action.—*Sanford v. Newell*, 126.
2. Under the Code of Civil Procedure of 1887 (§ 89) providing that "if the complaint be verified the denial of each allegation controverted must be specific and be made positively or according to the information and belief of the defendant," a denial in a pleading that, as to a fact alleged, the pleader "has no knowledge or information upon which to found a belief and therefore denies the same," is sufficient to present an issue.—*State ex rel. Milsted v. Butte City Water Co.*, 199.
3. The denial in an answer that "the amount of stock" sold by plaintiff to defendants was ever delivered, being pregnant with the admission that all of the stock had been delivered except a fractional portion, is insufficient to support proof of nondelivery.—*Edgerton v. Power*, 350.
4. A denial that as to certain facts stated, the pleader "has no knowledge or information sufficient to form a belief and therefore denies the same," is insufficient. (*State ex rel. Milsted v. Butte City Water Co.*, ante, page 199, cited.)—*Rossiter v. Loeber*, 372.

POLITICAL PARTY.

Conventions and nominations, see ELECTIONS.

PRINCIPAL AND AGENT.

Fraudulent relocation of mining claim, see FRAUD, 1, 2, 3.

Ratification of agent's act, see SHERIFF, 2.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

QUIET TITLE.

Refusal of court to consider complaint in action to, see TRIAL, 3.

RAILROADS.

Constitutionality of section 697, Fifth Division of the Compiled Statutes, defining liability of, as to employes, see CONSTITUTIONAL LAW, 10.

Liability for negligence of foreman, see NEGLIGENCE, 1, 6.

1. Mere prior possession of land, which is afterwards included in a grant by congress to a railroad of a right of way of 200 feet on each side of the center of its track, is insuf-

ficient to maintain ejectment as against the railroad.—*Burton v. Laughrey*, 43.

2. Occupancy of land within the right of way of a railroad company under a license from the company, by which the licensee was permitted to cultivate the same on condition of maintaining lawful fences and keeping the land free from combustible materials, is a use of that portion of the right of way by the railroad.—*Id.*

REPLEVIN.

Sufficiency of complaint in, see SALES OF PERSONALTY, 1.

It is a good defense to an action for the possession of personal property, which had been delivered to defendants under a written contract whereby the title remained in the vendor until all the installments of the purchase price were paid, that the real contract between the parties was that defendants should pay the amount remaining due from one to whom the property had been originally delivered and who had transferred his interest therein to defendants; that it was fraudulently represented by such party and plaintiff that the sum of \$649 remained due upon the purchase price, whereas but \$449 was due; that defendants executed said contract believing the representations to be true, and being without means of knowledge to the contrary, and that the sum of \$449 had been paid in full whereby defendants were entitled to the property.—*Sanford v. Gates*, 398.

RES JUDICATA.

1. Where the defendants in an action to foreclose a mortgage for default in interest, interposed several defenses, one of which was that by reason of a mutual mistake in the mortgage, foreclosure for nonpayment of annual interest was authorized, which was not the intent of the parties whereby the action was prematurely brought, and the jury found for the defendants upon that issue alone, and were instructed that if they did so find they need go no further in the case, the judgment rendered thereupon is not *res judicata* as to the other equitable defenses in a subsequent action brought to foreclose the mortgage upon full maturity of the debt. (*Kleinschmidt v. Binzel*, 14 Mont. 31, cited.)—*Gassert v. Black*, 35.
2. Where upon the first trial of a case in the district court the defendants assumed the burden of proof and introduced testimony and the case was removed from the jury and judgment rendered for plaintiff which was affirmed by the supreme court of the territory, a decision of the supreme court of the United States reversing the judgment for error in removing the case from the jury, ceases to be the law of the case so as to control the courts of this state, where upon second trial the testimony of both plaintiff and defendants is submitted to the jury and a new state of material facts disclosed, *Crelighton v. Hershfield*, 2 Mont. 169; *Daniels v. Andes Insurance Co.*, 2 Mont. 500; *Palmer v. Murray*, 8 Mont. 174; *Kelly v. Cable Co.*, 8 Mont. 440; *Davenport v. Kleinschmidt*, 8 Mont. 467, cited.)—*Maddox v. Teague*, 512.
3. The ruling of the territorial supreme court upon the former appeal of this case, that by the delivery of the chattel mortgage to the sheriff for the purpose of selling the property, he had authority to sell only for cash, not being disturbed by the decision of the United States supreme court, remains the law of the case upon this appeal.—*Id.*

SALES OF PERSONALTY.

A complaint in replevin against a sheriff who had attached certain sheep as the property of the plaintiff's vendor, which alleges a purchase of the sheep while in the possession of the vendor and his promise to herd and care for them until otherwise disposed of, but which fails to allege a delivery and change of possession at the time of the sale or prior to the attachment, is insufficient under section 226, Fifth Division of the Compiled Statutes, requiring an immediate delivery accompanied by an actual and continued change of possession in order to constitute a sale of personalty valid as against creditors of the vendor.—*Harmon v. Hawkins*, 525.

SECRETARY OF THE INTERIOR.

Decision of, as to Northern Pacific land grant, see NORTHERN PACIFIC LAND GRANT, 1.

SHERIFF.

- Where a sheriff in foreclosing a chattel mortgage upon a band of horses accepts a de-

posit from a bidder and then receives his bid upon a large portion of the horses, until his purchases greatly exceed the amount of the deposit, without further payment being made, and thereupon permits the mortgagor to redeem the unsold horses upon the payment of a sum of money which, together with the amounts already bid, was sufficient to satisfy the entire mortgage debt, and pays to the mortgagee the amount actually collected less the costs of the sale, he will be regarded as having treated the transaction as a completed sale so as to render him liable to the mortgagee for the amount for which such unpaid bids exceed the deposit.—*Maddox v. Teague*, 512.

2. Where it was contended by the sheriff that the mortgagee's agent authorized him to receive such bids in excess of the deposit under an arrangement whereby the deposit and horses were to be forfeited to the mortgagee in the event of the bidder failing to make good his bids within a specified time, which arrangement was denied by the mortgagee's agent, it was proper to submit to the jury the intention and understanding with which the mortgagee accepted from the sheriff a payment embracing such deposit, on an issue as to whether by so accepting it he ratified such alleged arrangement.—*Id.*

STATUTE OF LIMITATIONS.

In action against sureties on guardian's bond, see **GUARDIAN**, 1, 2, 3.

Possession for period of, when not defeated, see **EJECTMENT**, 1.

1. In an action by a wife for the conversion of personal property belonging to her and sold by her husband to the defendant, without her knowledge, the statute of limitations begins to run against the plaintiff's right of action at the time of the sale and not at the time when she first had knowledge of the sale.—*Yore v. Murphy*, 342.
2. An action to recover from the trustees of a corporation an indebtedness of the corporation for which they had become personally liable for failure to file an annual report as required by statute, is, for the purpose of applying the statute of limitations, an action for a penalty, and therefore within section 45 of the Code of Civil Procedure (1887), providing that an action for a penalty shall be commenced within one year from the time the cause of action accrued.—*State Savings Bank v. Johnson*, 440.
3. The liability of trustees of a corporation for failure to file an annual report must be enforced in an action commenced within one year from the time of the default, and the continuance of the default in successive years does not have the effect of renewing the liability on each default.—*Id.*

STATUTES.

Repeal of, impairing vested rights, see **CHATTEL MORTGAGE**, 1.

Repeal of, see **MARRIED WOMEN**, 1.

Construction of section 167, Probate Practice Act (1887), see **EXECUTORS AND ADMINISTRATORS**, 2.

In adopting the statute of another state we adopt the construction placed upon it by the courts of that state. (*First National Bank v. Bell S. & C. M. Co.*, 8 Mont. 32, *Stackpole v. Hallahan*, 16 Mont. 40; *Murray v. Heinze*, 17 Mont. 338; *State v. O'Brien*, ante, 1; *State ex rel. Milsted v. Butte City Water Co.*, ante, 199, cited.)—*Largey v. Chapman*, 563.

STREETS AND HIGHWAYS.

Where the limits of a city are extended to the opposite side of a river so as to embrace a bridge then owned by the county, the bridge becomes part of the city street by which it is approached and thereby ceases to be within any road district as established by the county, or under the control of county officers, but falls within the jurisdiction of the city officers by whom it should be kept in repair. (§§ 323, subd. 10, 419, 435, 1842, 1852-1854, Fifth Division of the Compiled Statutes.)—*Cascade County v. City of Great Falls*, 587.

SURETIES.

On guardian's bond, limitation of action against, see **GUARDIAN**, 1, 2, 3.

On assessor's bond, see **COUNTY ASSESSOR**, 2, 3.

On note, indemnity to secure, see **FRAUDULENT CONVEYANCE**, 2.

Failure of the obligee of an agent's bond to inform a surety, at the time of the execution of the bond, that the agent was then indebted to him in a former agency, does not

discharge the surety, where no representations were made by the obligee as to the trustworthiness of the agent, or inquiry by the surety as to the agent's former relations with his principal.—*Palatine Insurance Co. v. Crittenden*, 413.

TAXATION.

1. By the act of congress of March 12, 1889, granting to the Bighorn Southern Railroad Company a right of way through the Crow Indian reservation, the land embraced within such right of way was thereby segregated and thrown open to settlement within the meaning of the act of March 5, 1885 (Laws Mont.) declaring that all of a defined portion of such reservation that may hereafter be segregated and thrown open for settlement shall form part of Yellowstone county, and therefore, so much of said right of way as is embraced within such defined portions of the reservation is properly taxable in Yellowstone county.—*State ex rel. Custer County v. State Board of Equalization*, 389.
2. Under section 15, Article XII of the constitution, designating the officers who shall constitute the state board of equalization and providing that the duty of the board shall be "to adjust and equalize the valuation of the taxable property among the several counties of the state," such board has no power to increase the total valuation of the property of the state as disclosed and fixed by the abstracts and statements transmitted to it by the assessors and county boards of equalization.—*State ex rel. Wallace v. State Board of Equalization*, 473.

TENANTS IN COMMON.

Of mining property, right of one to enjoin other, see INJUNCTION, 1.

TENDER.

Sufficiency of, as to shares of stock, see CONTRACTS, 3, 4, 5, 6, 7, 8.

TRIAL.

1. Continual objections by the counsel for the state to questions asked the witnesses for the defendant, many without merit, and made for the purpose of keeping a knowledge of the case on its merits from the jury, is improper practice.—*State v. O'Brien*, .
2. The allowance of an amendment to a pleading during a trial is largely a matter of discretion and will not be held ground for reversal where it does not appear that a postponement of the case was requested or made necessary, or that the appellant was injured thereby.—*Bennett v. Tullman*, 28.
3. In an action to quiet title by the holder of a tax deed, it is error for the court to refuse to consider the complaint on the ground that the facts alleged were not sufficient to confer jurisdiction, where the complaint was not attacked by demurrer, and it appeared that the action was not commenced until after the time for redemption had passed and that summons was regularly served.—*Light v. Pressey*, 263.
4. The granting of a motion to dismiss an action after the filing of a complaint, answer and replication has the effect of a judgment on the pleadings.—*Largely v. Chapman*, 563.

WATER COMPANIES.

Mandamus to compel performance by, of public duty, see CORPORATIONS, 7.

WATER RIGHTS.

1. Mere lapse of time is not alone sufficient to establish abandonment of a water right through non-user. (*McCauley v. McKelg*, 8 Mont. 389, cited.)—*Gassert v. Noyes*, 216.
2. Abandonment is a mixed question of intention and fact, and where the defendants grantors of a ditch and water right had not used it for a period of three years, prior to conveying it, it is competent for them to testify as to their intention in not using it.—*Id.*

3. A prior appropriator of water cannot change the place of use of his water so as to deprive a subsequent appropriator of his rights, and therefore, where, at the time of the junior appropriation, the prior appropriator was returning the water used by him to the stream above the point of diversion by the latter, he will not be permitted to afterwards change his place of use so as to return the water to the stream below such point.—*Id.*
4. Section 1240, Fifth Division of the Compiled Statutes, conferring upon any person owning lands without available water facilities upon the same, an absolute right of way over the lands of others for the purpose of constructing ditches, does not by the mere force of its terms permit one to dig a ditch upon the lands of another, but permits the exercise of the right after proper proceedings in eminent domain.—*Emerson v. Eldorado Ditch Co.*, 247.
5. Where the defendant constructed and maintained a ditch across the plaintiff's land without legal right to do so, causing damages by overflow, plaintiff was entitled to a judgment for the amount of damages claimed, where the defendant, on the trial, admitted that plaintiff was the owner of the land at the time of its appropriation of the water; that it had constructed the ditch without plaintiff's consent, and that the damage was to the extent claimed.—*Id.*
6. Where the defendant and plaintiff's predecessors had, in 1881, adjusted a controversy in respect to the use of the waters of a stream by a contract defining their respective rights and manner of use, the fact that the plaintiff and his predecessor did not use any of the water from 1883 to 1893, during which period the defendants continued to use it all as permitted under the contract, does not justify a finding that defendants by such use acquired title thereto by adverse possession,—there being no evidence that the defendant ever assumed to act otherwise than under the contract, or had ever given notice that they claimed the use of the waters adversely to plaintiffs.—*Smith v. Hope Mining Co.*, 432.
7. Mere nonuser of water right is not an abandonment. (*Atchinson v. Peterson*, 1 Mont. 561; *McCauley v. McKeig*, 8 Mont. 389; *Tucker v. Jones*, 8 Mont. 225; *Middle Creek Ditch Co. v. Henry*, 15 Mont. 558; *Gassert v. Noyes*, ante, page 216, cited.)—*Id.*
8. A water right necessary for the operation of a mill used for mining purposes is an appurtenance thereto, and an intention to abandon must be clearly shown. (*Tucker v. Jones*, 8 Mont. 225; *Sweetland v. Olsen*, 11 Mont. 29; *Beatty v. Murray Placer Mining Co.*, 15 Mont. 314, cited.)—*Id.*
9. While the nonuser of a water right for a period longer than the statute of limitations would, if standing alone, be strong evidence of an intention to abandon it, yet where the water is used as an appurtenance to a mill which was closed down for the period in question and the evidence clearly shows that there was no intention to abandon the mill, the temporary and necessary nonuser of the water during the period in which the operation was suspended, is no evidence whatever of an intention to abandon the water right.—*Id.*

WIDOW.

Right of minor, to nominate administrator, see EXECUTORS AND ADMINISTRATORS, 13, 14.

WILLS.

By a clause in a will which provided that "Under none of the provisions of this, my last will, shall the share of my wife be less than \$7,000," inclusive of certain described life insurance amounting to \$5,000, it was the testator's intent that his wife should be a preferred legatee in the sum of \$2,000, to be paid out of his estate.—*In re Phillips' Estate*, 8'1.

WITNESS.

Additional, in criminal case, see CRIMINAL LAW, 7.

YELLOWSTONE COUNTY.

Right to tax right of way of Bighorn Southern Railway, see TAXATION, 1.

2193 162

Ex. 111



